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A
DISSERTATION
ON
The Development of Muslim Law in
British India

BY

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**Dedicated
To the Memory of
The Gréat Imam Abu Hanifa,
the founder of
The Hanafi School of Law**

PREFACE

IT the of time *Imam Abu Hanifa* the Muslim Hanafi Law was developed with extraordinary rapidity, and in short the Muslim *Corpus juris* was complete before his death in 767 A.D. and from that date it has not been materially altered or modified in any essential. Sir Henry Maine says 'A time always comes at which the moral principles originally adopted have been carried to all their legitimate consequences and then the system founded on them becomes as rigid, as unexpansive, and as liable to fall behind moral progress as the sternest code of rules avowedly legal'.¹ This characteristic phenomenon occurs, almost in all systems of jurisprudence, and the Muslim Law may in no way be an exception to the general rule. Thus the Muslim Law when it had fully developed tended to become rigid. Some of the great jurists disapproved of the rigidity of law and were evidently of the opinion that 'the gate of interpretation will forever remain open,' but there were other jurists who insisted on 'the closure of the Gate,' *Sad-ul bab-ul-ijtihad*, nevertheless it will be incorrect to say that the Muslim Law, has remained stagnant or has been devoid of legal growth. The writers whom we consider as authorities, the authors of the Hedaya, and the Fatawa-i-Alamgiri were men eminent in the history of medieval India. Though their works may be considered by some as consolidation rather than as development of law, nevertheless it shows that the law is flexible and not rigid as the opposite school maintained. In my opinion it is incorrect to say that the Muslim Law is rigid. Professor Santillana, in the Legacy of Islam, accordingly observes, "Having as its scope social utility, Muslim Law is essentially progressive, in much the same way as our own. Being a product of language and logic it is a science."²

¹ Ancient Law Ch. iii p.

² Legacy of Islam (Clarendon Press, 1931) p. 305.

In the Introduction¹ I have referred to general development of Muslim Law and incidently to development of Muslim Law in British India. Its later development is greatly hampered by the non-interference policy of the British Government, and the very cautious attitude of the judiciary including the Privy Council not to put their own constructions in opposition to express views of commentators of great antiquity. In spite of this declared policy one would really wonder to see what enormous changes perhaps unconsciously have taken place in the Muslim *Corpus juris*. On some points the Muslim Law has been completely superseded, in others it has progressively been altered, and on some points it has been misunderstood and wrongly applied. An attempt is made in these few pages to trace, its growth with reference to the Muslim Law of marriage, dower, divorce legitimacy, *waqf* etc.

This pamphlet is really a continuation of my previous work, "The Administration of Justice of Muslim Law," wherein I had briefly surveyed the history of Muslim Law at the time of the Holy Prophet, Al-Khulafaur Rashidun, the Umayyad, the Abbaside, and the Fatimid Khilafat, in Spain, in the Turkish Empire and Egypt, in Persia and finally in India during the era of the Muslim Kings, and now this work completes the history of Muslim Law in British India. I have not discussed the whole of Muslim Law, but only that part which has been affected and developed by the general Law in British India. I have not dealt with the Muslim Law of evidence, contract, sale and lease because in their case it is not a case of development but of complete supersession by the Indian Evidence Act, the Contract Act and the Transfer of Property Act.

I trust the work will meet with the approval of those interested in the Muslim Jurisprudence.

M. U.

Law Department,
University of Allahabad,
April, 25th 1932.

¹ This is taken from my book 'A digest of Anglo-Muslim Law.'

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INTRODUCTION

§ 1. AL-ULUM-US-SHARIAT

The Mus'im encyclopædists have designated the appellation Al-Ulum-us-Shariat to the science of Muslim religion and Jurisprudence.

According to our jurists "Al-ulum-us-shariat" is divided into seven sections or four broad sub-divisions.¹

- I (1) Ilm-ul-Qirat the science of Reading the Koran.
(2) Ilm-at-Tafsir, the science of the Interpretation of the Koran.
- II (3) Ilm-al-Hadis, the science of the Traditions.
(4) Ilm-Dirayat-al-Hadis, the science of critical discrimination in matters of Traditions.
- III (5) Ilmusul-addin, Ilmal-Kalam, the science of Scholastic Theology.
- IV (6) Ilmusal-al-Fiqh, the science of Principles of Jurisprudence.
(7) Ilm-ul-Fiqh, the science of Practical Jurisprudence.

The Koran may well be described as the final and the great legislative Code of Islam. It is the 'Fons publici privatique iuris,' 'Finis æqui iuris,' and "Corpus Omnis *Muslim* iuris" of the science of Muslim Jurisprudence. The Koran is the divine communication and revelation to the Prophet of Islam. The Koran was in existence in manuscript form during the life-time of the Prophet. It was also preserved in memory of the companions. Abu Bakr and Umar preserved this collection carefully. In A. H. 30 Usman finding some discrepancies in the copies of the Koran, which were circulated in the provinces, issued an official copy of the Koran, and all those copies in circulation were suppressed.

¹ Von Hammer in Encyklopädische Uebersicht der Wissenschaften des Orients, p. 568 gives an admirable survey of the whole system See also W. H. Morley's Analytical Digest (The Muhammadan Law) p. CCXXVII.

The following are the eminent interpreters, writers of Tafsir of the Holy Koran.

- (1) Abu Jafar Muhammad bin Jarir well known as the historian at-Tabari (died A. H. 310. A. D. 922.)
- (2) † The Kashshaf by Abu-Qasim Jar ullah Mahmud bin Umar as-Zamakhshari (died A. H. 538 A. D. 1143.)
- † (3) The Anwar-al-Tanzil by Nasir-uddin Abdallah bin Umr al-Baizawi (died A. H. 685 A. D. 1286).
- (4) The Yakut-al-Tawil, Tafsir-al-Ghazali by Abu Hamed Muhammad-al-Ghazali (died A. H. 504 A. D. 110).
- (5) The Durr-al-Mansur by Jalaludin Abdur-Rahman bin Ali Bakr as-Suyuti (died A. H. 911 A. D. 1505).
- (6) The Tafsir-al Jalalain by Jalaluddin Muhammad bin Ahmad Al-Mahalli (died A. H. 864 A. D. 1459) and by Jalal-uddin Abdul-Rahman bin Abu Bakr-as-suyuti.
- (7) The Tafsir Kabir by Imam Fakhruddini-Razi.
- (8) The Tafsir Fath-al-Aziz by Shah Abdul Aziz of Delhi.
- (9) The Tafsir Ahmadiya by Mulla Jiwan Jaunpuri (during the reign of Aurangzib.)

The Traditions consist of the actions precepts and teachings of the Prophet and their authenticity rests on the sunnat. They are classified into these divisions, "Hadisul Sahih Matwatir, Hasan and Zaif," and the essential test is that they should not be contrary to the Koran. The first writers of Hadis, Traditions, are:—

II
The Hadis.

- (1) Abu Bakr bin Shihab Ash-Shafi' Az Zuhri. (the Masnad and the Sunan.)
- (2) Abdul-Malik bin Juraij.
- (3) * Malik bin Anas, the Muwatta.
- (4) * Muhammad Ibn Idris.
- (5) * Abu Abdillah Ahmad Ibn Hambal. (The Masnadul Imam Hambal).

The most eminent books of Traditions are :—

- (1) The Jami-us-Sahih by Abu Abdullah Muhammad Ibn Ismail al Bukhari (died A. H. 256 A. D. 869).¹
- (2) The Sahih Muslim by Al-Hajaj bin Muslim of Nishapur (died A. H. 261 A. D. 874).
- (3) The Jami-al-Lal by Abu Isa Muhammad bin Isa-at-Tirmizi (died A. H. 279 A. D. 892).
- (4) The Kitab As-Sunan by Abu Dawud Sulaiman bin Al-Ashas surnamed As-Sajistani (died A. H. 275 A. D. 888.)

† Both these works are universally respected by the Sunni Muslims.

* The founders of the Maliki. Shafi's and the Hambali Sunni School of Jurisprudence.

¹ His compilation contains about 8,000 traditions selected from a mass of 600,000 after a labour of 10 years.

(5) *Al-Muḥṭabā* by Abū Abdur-Rahmān Ahmad bin Abī Shu'ayb an-Nasāi.

(6) *The Kitāb as-Sunan* by Abū Muḥammad bin Yazīd bin Majāh al-Kazwīnī (died A. H. 273 A. D. 886.)

These six books are called *Al-Kutub-as-Sittah fi-al-Hadis*, and the first two of Bukhari and Muslim are by far the greatest authority.

§ 2. *The Development of the Muslim law by the Jurists.*

The *Ilm-al-Fiqh* is divided under two sections the *Ilm-al-Fatawa* which is known as the Science of decisions and the *Ilm-al-Faraiz*, the science of the law of inheritance.

In connection with the Muslim administration of Justice, the *Fatawas* of the Jurists known as *Mujtahids*,¹ have played an important part. The opinions expressed by these doctors of laws have virtually controlled the judiciary in administering justice. This is an anomaly which presents itself to a student of Muslim Jurisprudence. During the time of the Prophet only four persons. Umar, Ali, Muaz and Abu Musa were authorised to issue *Fatawas*, and according to Imam Muhammad *Kitab-ul-Asar* there were only six persons divided into two groups. They were authorised to issue *Fatawas* after joint consultation and deliberation. Ali, Ubay and Abu Musa were in one group. Umar, Zaid and Ibn Masud were in the other group.²

The first Khalifa, Abu Bakr, adopted the old Arabian precedent of deciding the legal question by *Ijma*, the consensus of opinion of the first great followers of Islam. Umar followed this practice and the *Fatawas* passed by this deliberative body were circulated throughout the Muslim world. Shah Waliullah refers to this in the *Hujjatullah-ul-baligha*.³

1 According to Imam Abu Yusuf the issuing of a *Fatawa* is not permissible to any one but a *Mujtahid*.

A *Mujtahid* is defined in the *Talwih* thus : " A Muslim, wise, adult, intelligent by nature, well acquainted with the meaning of Arabic words and mandatory passages in the Koran, learned in the traditions of the Prophet, found in text books or orally reported, as well as those which have been abrogated."

2 "It was the practice of Umar to consult and discuss the problems with the followers of the Prophet, till the solution was free from doubt, and it is because of this that *Fatawas* given by Umar were acted upon throughout the East and West,"

Umar also appointed such leading figures as Ali, Usman, Muaz bin Jabal, Abdur Rahman bin Awf, Ubay bin Kab, Zayd bin Sabit and Abu Hurayra to issue Fatawas. Shah Wali-ullah definitely holds that it was not permissible to issue Fatawas without Khalifa's permission.¹

This arrangement continued during the Khilafat of Usman and Ali who was himself a great jurist. However after the era of Khulafa-ur-rashidun, the institution of *Ifta* declined, and no attempt was apparently made by the Umayyads or the Abbaside Kings to re-inaugurate, and establish it on permanent basis.² The Mujtahids however of their own accord continued to issue Fatawas on legal points submitted to them. and the multiplication of the fatawas without any authority to control its issue must have created a similar period as at Rome.³

Abdullah bin Masud had opened a School for giving instructions in Fiqah. Some of his distinguished pupils like Alqamah and Aswad and their successors 'Ibrahim al Nakhai had prepared a book containing the Fatawas of the fourth Khalif, Ali, and those of Abdullah bin Masud. In 120 A. H. the great Imam Abu Hanifa was made the Head of this institution, and he was the first to realise the necessity of establishing "a faculty of law," where legal problems could be debated and then published as authoritative opinion or combined Fatawas. The works of this deliberative body were published in the form of a Code, forty Jurists notably among them Kazi Abu Yusuf, Daud al-Taiyy, Hafs Ibn Ghiyas, Habban, Mandal, Yahya Ibn Ali Zaida, Qasim Bin Ma'n, Zufar and Imam Muhammad worked

1 Shah Wali-ullah Izalatul-khifa:—Vide the administration of Justice of Muslim law by the present author p. 118.

2 Of the later Muslim Kingdoms Turkey is the only country which established a special department called the Fatwa Khanah under the Grand Mufti who was given the appellation of Sheikh-ul-Islam by Muhammad II.

3 At Rome some jurists were invested with the *jus-respondendi* (which is similar to the fatawas) and their works principally of Papinian, Paulus Gaius, Ulpian and Modestinus had acquired a prescriptive authority. The multiplication of the Responsas created difficulties and the remedy provided by the law of Citations enacted by Theodosius II and Valentinian III in A. D. 426 was "that the opinion of the majority of the above jurists should prevail and if the numbers were equal the view of Papinian should be applied."

for a period of thirty years to produce this gigantic Code. The publication of the Code was greeted with acclamations throughout the Muslim world. But unfortunately the Code was lost and we have no trace of it.

The authorship of Fiqh-i-Akbar is attributed by some to Abu Hanifa, while some well-informed authorities doubt that to be his production. Of his works Masnadul Imam and a letter to Kazi Abu Yusuf have only come down to us. For his independent view and original thought Abu Hanifa had acquired the title of up-holder of private Judgment. The Fatawas of Imam Abu Hanifa had a binding effect on the decision of the Courts, and it is related in Siratun-Nu'man,¹ that the famous Kazi Ibn Abi Layla who had served on the bench for 33 years, was once much annoyed by Imam Abu Hanifa's criticisms on his judgments, and he reported to the Governor of Kufa, that the great Imam should be stopped from issuing Fatawas. The Governor reluctantly issued the order with which the Imam complied. This incident once more illustrates that jurists can only issue Fatawas with direct permission (at least by tacit consent) of the ruling power.

The present Hanafi jurisprudence consists mainly of the commentaries written by various authors on the works and opinions of Imam Abu Hanifa. In some cases the opinions of the great Imam have been superseded with the consent of all the jurists and the view of one or more of the disciples has been accepted *in toto*. But there is no such general rule that in case of conflict between the great Imam and his two chief disciples the view of majority should be adopted.²

1 Shibli Siratun-Numan (in Urdu), p. 193.

2 The opinion expressed by Mahmood, J. in Abdul Kadir v. Salima, 8 All., 149, is incorrect. Mahmood, J. observed that "it is a general rule of interpretation of the Muhammadan Law that in cases of difference of opinion among the jurisconsults Imam Abu Hanifa and his two disciples Quazi Abu Yusuf and Imam Muhammad the opinion of the majority must be followed and in the application of legal principles to temporal matters the opinion of Quazi Abu Yusuf is entitled to the greatest weight." See criticism in "the Muslim Law of Marriage" by the present author, p. xxix.

"The age of Abu Hanifa was the age of jurists." At Medina Imam Malik had established the Maliki School and his pupil Imam Shafi'i founded the Shafi'i school. Imam Shafi'i's pupil, Imam Hambal, founded the fourth and the last of the Sunni Schools of jurisprudence.

These four great Imams were recognised as Mujtahids by the Muslims. There is not much difference in the fundamental principles enunciated by these four Schools, they only differ in minor details.

During the reign of the Omayyed Khalifs the jurists of Iraq and Mesopotamia commenced the study of law as a science. The Khalif Umar-ibn Abdul Aziz himself possessed an extensive knowledge of Fikah and Hadis, and encouraged the scientific study of law. Wasil ibn Ata the founder of the Motazala sect introduced technical legal phraseology, and classified the laws under different subjects.

§ 3. *The four Sunni Schools.*

The most important era in the development of law began with the reign of the Abbaside Khalifs. This period is remarkable for the consolidation and the theoretical study of the science of jurisprudence. The four great Sunni Schools of law came into prominence.

Imam Abu Hanifa (his real name was Numan bin Thabit), the founder of the most important sect was born in 80 A. H. He visited Imam Baqir in Medina and was a contemporary of his son Jafar-Sadik, the great Imam of the Shiah School of law. He attended the lectures of Hamad and the famous traditionists Ash Shabi Qatadah and others. He became the Head of the School of Kufa. Imam Abu Hanifa was known all over the Muslim

A. H. 80—150. world as a master of Jurisprudence, and "upholder
A. D. 699—767. of private judgment". He boldly enunciated the doctrine of *Qiyas* or analogical deduction and modified its application calling it *Istehsan*." The theory of *Istehsan* resembles the Preator's Edict or Equity in England. He further extended the application of the doctrine of the consensus of opinion, known

as *Ijma*, and recognised the force and validity of reasonable immemorial customs. His two principal disciples, Abu Yusuf who eventually under the Abbasides became the Chief Justice and Muhammad, both great traditionists, were influenced by Imam Malik's teachings. They are universally respected by the Muslims of the world, and are given the appellation of "Sahibain". Abu Hanifa refused to accept high judicial offices which were offered to him. He was imprisoned and there he died, poisoned it is said at the instance of the second Abbaside Khalif. He was so popular with the people that for ten consecutive days about fifty thousand people offered his funeral prayers. His followers are found all over the Muslim world.

Malik Ibn Anas is another great jurist. He was born at Medina in 95 A. H. He lived there all his life and held the position of Mufti. He is the founder of the second School known after his name as the Maliki.¹ Malik's doctrines were not essentially different from Abu Hanifa, but he relied more upon traditions and precedents established by the Prophet's "principal companions." He inaugurated the important doctrine of *Muslahat*, and to the four main sources of Muslim law the Koran, the *Hadis*, *Ijma* and *Qiyas* he added a fifth source *Istadlal*, a juristic deduction distinct from analogy. This sect is mostly found in Africa.

Malik's favourite pupil was Muhammad Ibn Idris Ash-Shafi who became the leader of the third School of Muslim jurisprudence. Shafi was a jurist of great eminence and repute, and his followers are found mostly in Egypt and Arabia. He adopted the views of Abu Hanifa as well as those of his master Imam Malik with such clearness of thought, balance of judgment and moderation, that in importance this School is now reckoned as next to the Hanafis. He was the first to write a legal treatise on Usul. He visited Baghdad in A. D. 810—13 but returned to Cairo where he spent the rest of his life.*

1 Mr. F. H. Ruxton's Maliki law.

* The development of law by these four Schools may favourably compare with the rise of the Humanists the French historical School in the 16th century, or to that of Hugo and Savigny's Schools of jurisprudence.

Shafi's favourite scholar was Abu Abidullah Hamid Ibn Hambal. Imam Hambal founded the fourth and the last of the Sunni Schools of Jurisprudence. He was born in Baghdad in 164 A. H. He was well-known as a famous traditionist and theologian. The Khalif Al-Mamun persecuted him for his views on divinity, which served only to enhance his popularity far and wide, and it is said that when he died in 241 A. H. over 800,000 men and 600,000 women attended his funeral. The Hambalis are numerous found in central Arabia, the Persian gulf and in Central Asia.

§ 4. *The Sources of Muslim Law.*

According to some jurists the origin of Law is to be found in a fictitious primordial covenant *misaq-i-azali* entered into between man and God at the beginning of Creation. This alleged covenant is not accepted by all jurists, but this much is conceded that the authority to make laws belongs to God, and this system of promulgation of laws has been vouchsafed through successive prophets. Thus the fundamental source of the Muslim Law is the Holy Koran and next are the authentic *Hadis* the precepts of the Prophet in matters of Law and religion.

Ijma, or "Consensus of juristic opinion" is the next important source of law. It is defined "as agreement of the jurists among the followers of Muhammad in a particular age on a question of law."¹ Its authority is based on well-known Hadises. 'It is incumbent upon you to follow the most numerous body. 'Who ever separates himself from the main body will go to hell.' 'He who opposes the people to the extent of a span will die the death of men who died in the days of ignorance.' The Hanafi, Shafi Maliki and Hambli Schools of Sunni jurisprudence recognise *Ijma* as a valid source of law.

Ijma is of various kinds.

- (1) *Ijma* of the companions of the Prophet which is universally respected throughout the Muslim world, and is incapable of being repealed.

1 Abdur Rahim, 'Muhammadian Jurisprudence' pp. 115—136.

(2) *Ijma* of the jurists.

(3) *Ijma* of the people, the general body of Muslims.

The majority of the jurists are of the opinion that if agreement of all the Muslims is essential, *Ijma* would become impracticable, and the *Mujtahids*, learned men in law are alone competent to participate in *Ijma*. However the fundamental observances of Islam, as to prayers, the poor rate, fasting pilgrimage have been established by *Ijma* of the people. Thus *Ijma* is also applicable as the majority principle in the Muslim polity. The election of the first Khalif Abu Bakr was based on the doctrine of *Ijma*.

Ijma is not confined to any particular age or country. It is completed the moment the jurists after deliberations come to an agreement, and after decision it cannot be reopened or challenged by individual jurists. However *Ijma* of one age may be reversed by subsequent *Ijma* of the same age or subsequent age. *Ijma* may be based on the Koran, *Hadis* or on *Qiyas*.

According to the four Sunni Schools of jurisprudence matters which have not been provided for by Koran, *Hadis* or *Ijma* the law may be deduced from any of these by means of *Qiyas*, analogy.¹ *Qiyas* is defined as "an extension of law from the original text by means of a common cause *illat*." It is a process of deduction applying the law of a text to cases which though not covered by the language of the text, are nevertheless covered by the reason of the text, the rules of law thus deduced are not absolutely authoritative as those laid down by Koran, *Hadis* or *Ijma*. But the deduction should not really change the law of the text and if two deductions are found to be in conflict, a jurist may accept any of them.

Illustrations.

(1) According to Shafii school:—"A marriage does not stand on the same footing as property, and therefore cannot be proved by the testimony of two women and one man."

According to the Hanafi School:—"The deduction is bad, as it is based on a negation. The reason, why mixed evidence is allowed by the Hanaf in marriage is that its validity cannot be affected

¹ Abdur Rahim Jurisprudence pp. 137—162.

by the existence of a doubt in the proof of it as appears from the fact that a valid marriage would be constituted even if it be contracted in jest."

(2) *Shafis*:—"A wrong doer who has forcibly taken possession of the property of another is liable to restore it to him and is further liable to account for the mesne profits, just as a man who commits breach of a contract is liable for the consequent damages."

Hanafis :—"The wrong doer is bound to restore the property, but is not liable for the mesne profits because usufruct is an accident and does not stand on the same footing as property, which must be a thing or a physical object. Hence there is no basis for assessment of damages, the principle of which is that the parties should be placed on a footing of equality."

According to the Hanafi School a law analogically deduced may not commend itself to the jurist, then he may
 Istehsan juristic equity. accept instead a rule better advance in conformity with the interest of justice. This doctrine is technically known as *Istehsan*, "Juristic Equity."¹ Some Hanafi jurists call it hidden analogy, but there is no doubt it has a wider scope than *Qiyas*. It should not be opposed to a perfect analogical deduction relating to the same matter.

Imam Malik proposed a similar doctrine of "public good"
 Public good deduction of law based on considerations of the
 Muslahat. public good. The Hanafi jurists considered it as too vague to be useful, and the Maliki jurists apparently did not take full advantage of this doctrine.

According to the Maliki and the Shafi jurists *Istidlal* is a
 Istidlal "distinct method of juristic ratiocination," *Istidlal* means the drawing of an inference from a particular thing. According to the Hanafis it is a special mode of interpretation. According to some jurists the Hanafi doctrine of *Istehsan*, and the Maliki doctrine of public good are covered by *Istidlal*.

Custom, *Urf*, is a valid source of law. It is deemed to
 Custom. have the force of *Ijma*. Thus the Hedaya says, "that custom holds the same rank as *Ijma* in the absence of an express text." According to the jurists custom

¹ Abdur Rahim ' Jurisprudence pp. 161, 168.

is preferred to analogical law. According to some Hanafi jurists custom is recognised as a source of law under *Istehsan*. A custom which is immemorial, continuous, certain, reasonable and not inconsistent, with the Koranic injunctions has the force of law though in fact it has no spiritual or divine authority.

§ 5. *The Shia School.*

The term Shia means *a party*, and it specifically means the followers of Ali, the fourth Khalif, who is considered by the Shias to be the immediate rightful successor to the Holy Prophet. According to L. Massignon *Annuaire du Monde Musalman* (3rd ed. 1929. pp. 24 and 38) out of 250 million Muslims, the Shia are 20 million and according to C. Frank *Islamica* (1926, ii, 176), there are 220 million Sunnis and 10 million Shias. The Shias may be divided into several sub-schools, but the most important are the Isna-Asharis, Twelvers, and the Ismailis, and the Zaidis of Southern Arabia. The most eminent Shia jurists are Zaid the author of *Majmul—Fiqh*, Imam Baqir and his illustrious son, Imam Jafar-as-Sadik, these Imams are universally respected by the Sunnis also. It was on the death of Imam Jafar that a great difference arose between the Shias, the majority following Imam Musa Kazim, and through him six other Imam making up the twelve Imams of the Isna Ashari, and the minority followed Ismail elder brother of Imam Musa Kazim. At the present time the Eastern Ismailis Khojas represent in India the followers of Aga Khan,² and the Western Ismailis, the Bohras, are divided chiefly into the Daudis and the Sulaimanis, they are spread over Syria and the Persian Gulf. However the Isna Ashari are the only important school of the Shia Law. The Persians, including the kings of Persia and the Nawabs of Lucknow, and Murshidabad in India belong to this school, and this branch of the law is just as much law of the land in British India as is the Sunni Hanafi Law.³

1 In British India custom on many points has superseded the Muslim Law, e.g. the exclusion of daughters from inheritance. ~~Vide sec. 227 p. 124.~~

2 Vide Advocate General v. Muhammad Husain (Aga Khan) 12 Bom. H.C.R. 323 (1866) [Held Khojas are Ismailis,] Haji Bibi v. H. H. Sir Sultan Mahomed Shah the Aga Khan, 11 Bom. L. R. 409 (1908). [Held Khojas are not Isna Asharis Shias]

3 Vide Aziz Bano v. Mahomed Ibrahim (1925) 47 All. 828. (835).

The eminent Shia writers of Tafsir are :—

- (1) Abu Jafar Muhammad bin Babawaih surnamed As-Saduk.
- (2) Abu Jafar at-Turi The Mujmia-al Bayan li Ulum-al Kuran.
- (3) Nur-uddin Abdur-Rahman Jami.
- (4) Kamal-uddin Husain al-Waiz-al-Kashifi as Sabzawari. The Tafsir Husani.

The Shia jurists of the Traditions are:—

- (1) Abdullah bin Ali Al-Halabi.
- (2) Abu Muhammad Hisham Ash-Shaibani.
- (3) Yunus bin Abdur-Rahman Al-Yaktini.
 - (i) Ilm-al-Hadis.
 - (ii) Ikhtilaf al Hadis.
- (4) Sheikh Abu Jafar at Tusi.
 - (i) Tahzib-al-Ahkam.
 - (ii) Istibsar.
- (5) Muhammad bin Yakub Al-Kulini ar Razi.
 - (i) Kutub-i-Arbaa.
- (6) Abu Jafar Muhammad Al-Kummi.
 - (i) Man la Yahzuruhu al-Faqih.
- (7) Abul-Abbas Ahmad bin Muhammad Ibn Ukdah.
- (8) Ali bin Husain Al-Masudi,
- (9) Abul-Faraj Ali bin Al-Husain al-Isfahani.
- (10) Shaikh al-allamah Al-Hilli.

§ 6. *The Development of Law.*

Law is developed by a process of interpretation and by private judgment. The guiding factor is to secure the ends of equitable justice. While it is true that the Koranic law of Islam is unalterable and unchangeable, however a wide latitude is given by *Shera*, (Law) for the expansion of law. We may refer to the tradition reported by Muaz bin Jabal that the Prophet of Islam had approved of deciding cases, when the Koran and the traditions were silent on the point, in accordance with private judgment.¹ This is technically known as *Ijtihad* its scope is very wide. The Fatawa Alamgiri says accordingly, "When there is neither written law, nor concurrence of opinions, for the guidance

¹ When the Apostle of God sent Muaz to Yemen, he enquired, "How will thou administer justice," Muaz replied "I will judge by the Koran." The Prophet said, "If thou do not find its solution in the Koran." Thereupon Muaz replied, "Then I will decide in accordance with the traditions of the Prophet." The Prophet said, "And if you do not find its solution in the traditions," Muaz replied "then I will decide according to my own judgment."

INTRODUCTION

of a Kazi, if he be capable of legal disquisition and have found a decisive judgment on the case, he should carry such judgment into effect by his sentence, although other scientific lawyers may differ in opinion from him, for that which, upon deliberate investigation, appears to be right and just, is accepted as such in the sight of God."

According to Sir Henry Maine the chief agencies by which the progress of law is affected are in their historical order, (1) Legal Fictions, (2) Equity and (3) Legislation.¹ Fiction is "any assumption which conceals, or affects to conceal, the fact that a rule of law has undergone alteration its letter remaining unchanged, its operation being modified." In Roman law the Fiction of Adoption, the interpretation of the pontifices and that of the prudentes are notable examples. Similarly under the Muslim law the doctrine of *Ijtihad*, and later juristic deduction technically known as analogy, "*Qiyas*," are instances of development of law by legal Fictions. The function of analogy is to extend the law of the text, the theory being that the newly discovered law, though not covered by the language of the text, is governed by the reason of the text. But Mr. Abdur Rahim points out that "the writers on jurisprudence do not admit that extension of law by process of analogy amounts to establishing a new rule of law."²

The next stage is the development of law by Equity. "The Equity whether of the Roman Praetors or of the English Chancellors, differs from the Fictions which in each case preceded it, in that the interference with law is open and avowed."³ It seems to possess a superior sanctity. The introduction of *Jus Naturale* illustrates the influence of Praetorian equity in the Roman law, and the point of contact between the *Jus Gentium*, and *Jus Naturale* was this notion of "*Aequitas*," a levelling influence. In the Muslim law Imam Abu Hanifa supplemented this process of law and called it *Istehsan*. Thus a jurist was permitted to devise a rule of law in the interest of justice and public welfare. The Hanafi jurists speak of *Istehsan* as hidden analogy; the other

¹ Vide Maine's Ancient Law, p. 29.

² Abdur Rahim Muhammadan Jurisprudence, p. 189.

³ Maine's Ancient Law, p. 88.

three Schools opposed this innovation, and Ima'n Shafi'i retorted "whoever resorts to *Istehsan* makes law." But in course of time they were forced to modify their views, and Imam Malik, founded the doctrine of public good, "*Maslahat*", a process similar to juristic equity, and followed it up by inventing *Istidlal* a distinct method of juristic ratiocination which the Shafi'i also accepted. The development of law by *Istehsan*, *Maslahat* and *Istidlal* represents the period of juristic Equity in the Muslim law.

Legislation is the last agency to come into operation, as a suitable and proper means of effecting alterations in the laws governing civilised communities. It differs from Legal Fictions and just as much from Equity as "Its obligatory force is independent of its principles." In the Muslim countries the edicts of the Kings for instance the *Kanunnameh* of the Sultans of Turkey are good examples of direct legislation on points not covered by the *Shera*. The doctrine of *Ijma* is also notable example of legislation by the jurists in Muhammadan law. The codification of Roman law under Justinian, and partial codification and enactments relating to the Muslim law, notably the modern Egyptian Code of Hanafi law of Muhammad Kadri Pasha and various enactments in Turkey and other countries, and in India for instance the Waqf Acts of 1913 and 1923 are the latest agencies in the development of the *Shera* of Islam.

But the Muslim law was greatly developed in a movement parallel to the *Responsa Prudentium* of Roman law. Bryce has correctly remarked "In the East, as for instance, in such countries as Turkey or Persia, there is little that can be called general legislation. Hatts are no doubt occasionally promulgated by the Sultan though they are sometimes not meant to be observed, and are frequently not in fact observed. So far as new law is made, it is made by the learned men who study and interpret the Koran, and the vast mass of tradition which has grown up round the Koran. The existing body of Musulman law has been built up by these doctors of law during the last twelve centuries, but chiefly in the eighth and ninth centuries of our era; and a vast body it is."¹ "No system of law is the product of a single mind

or age,"¹ the divine communications of the Holy Koran laid down only the fundamental principles, and the entire bulk of the Muslim jurisprudence is the result of development and expansion, by Juristic interpretation and judicial dicta, by legislation and codification, covering centuries of constant labour on the study of the "Shera" itself, and the comparative jurisprudence of other legal systems of the world. "We all recognise now that law has grown by conscious efforts towards the solution of social problems conditioned by causes which spring from previous stages of development and from the influence of surroundings..... Evolution in this domain means a constant struggle between two conflicting tendencies: the certainty and stability of legal systems and progress and adaptation to circumstances in the order to achieve social justice."²

§ 7. *The Muslim Law in British India.*

The Muslim Law is applied by the Courts to the Muslims in matters affecting their personal law. It is regulated by enactments of the Parliament and by local legislation. As to the Presidency towns vide the Government of India Act 1915, 5, 112 [5 and 6 Geo. 5 ch. 62.]

"The High Courts at Calcutta, Madras and Bombay in the exercise of their original jurisdiction in suits against inhabitants of Calcutta, Madras, or Bombay, as the case may be, shall in matters of inheritance and succession to lands rents and goods, and in matters of contract and dealing between party and party, when both parties are subject to the same personal law or custom, and when the parties are subject to different personal laws or customs to which the defendant is subject".

In Bengal United Provinces and Assam it is provided by Act XII of 1887 s. 37 that the Civil Courts shall decide questions relating to "succession, inheritance, marriage or any religious usage or institution" by the Muhammadan Law where the parties are Muslims.

¹ "Law is the product of the entire history of a people, an evolution, by organic growth." Dr. Sherman, *Roman Law in the Modern World*. p. 282.

² Vinogradoff, P. "Historical Jurisprudence," Vol. I, p. 146.

In Madras the same is advocated by the Madras Civil Courts Act 111 of 1873 s. 16, that all questions affecting the Muslims regarding "Succession, inheritance, marriage.....or any religious usage or institution" shall be decided by the Muslim Law or custom.

In the Punjab and the North-Western Frontier Province the Punjab Laws Act IV of 1872 S. 5 and the North-Western Frontier Regulations VII of 1901 provide as follows.

"In questions regarding succession.....betrothal, marriage divorce, dower.....guardianship, minority, bastardy, family relations, wills, legacies, gifts, partitions or any religious usage or institution, the rule of decision shall be :—

(1) Any custom applicable to the parties concerned.....

(2) The Muhamedan Law, in cases where the parties are

.....

Similarly in Oudh, the Oudh Laws Act XVIII of 1876 s. 3, in Ajmer Merwara, the Ajmer Merwara Laws Regulation III of 1877 ss 4-5, in the Central Provinces the Central Provinces Laws Act and XX of 1875 s. 5, and in Burma the Burma Laws Act XIII of 1898 s. 13 enact similar provisions safeguarding the application of the Muslim Personal Law for the Muslims especially regarding marriage, dower divorce inheritance etc. and some parts of the Muslim Law are administered as a matter of justice equity and good conscience *e.g.* the Muslim Law of Pre-emption.

The Muslim Khojas and Cutchi Memous in the Bombay
Communities Presidency are governed regarding succession and inheritance by the Hindu Law in preference to the Muslim Law. The same is provided now in the Cutchi Memons Act XLVI of 1920 and the Cutchi Memons Amendment Act XXXIV of 1923. Similarly in matters of succession and inheritance the Muslim Borahs of Gujrat² and the Mulesalam Girasies of Broach³ are governed by the Hindu Law and among

1 Khojas and Memon's case (1847) Perry's O. C. 110. Hirabai v. Gorbai 12 Bom. H. C. 294 (1875), [Khojas], Abdul Cadur v. Turver (1884) 9 Bom. 158. (Cutchi Memons). Moosa Haji Joonas. v. Haji Abdul Rahim 30. Bom. 107 (1905).

Jan Mahomed v. Datu 38 Bom. 449 (1914).

2 Bai Bajpai v. Bai Santok 20. Bom. 58 (1894).

3 Fatesangji v. Harisangji (1894). 20 Bom. 181.

the Lubbais of Coimbatore¹ the daughters are excluded by the son. However the Halai Memons² of Bombay are governed by the Muslim Law.

The term "Mahomedan" used in the enactments includes a Muslim by birth, as well as a Muslim by religion, that is the Muslim Law is equally applicable to *bona fide* converts to *Islam*.³

The Privy Council and the Indian High Courts have had considerable affect on the Muslim Law. In *Khaja Husain Ali v. Shazadi Hazari Begum*,⁴ Markby, J. observed: "The means of discovering the Muhammadan Law which this Court possesses are so extremely limited that I am glad to avail myself of any mode of escaping a decision on any point connected herewith." While in *Mallick Abdool Gafoor v. Mulika*.⁵ Garth, C. J. observed, "In dealing with these points we must not forget that the Muhammadan Law, to which our attention has been directed in works of very ancient authority, was promulgated many centuries ago in Baghdad and other Muhammadan countries under a very different state of laws and society from that which now prevails in India and although we do our best here in suits between Muhammadans to follow the rules of Muhammadan Law, it is often difficult to discover what these rules really were.....we must endeavour as far as we can to ascertain the true principle upon which that law was founded, and to administer it with due regard to the rules of equity and good conscience, as well as to the laws and state of society and circumstances which now prevail in this country." However again in *Aga Mahomed v. Kulsum Bibi*⁶

1 *Shaikh v. Muhammad* 39 Mad. 664 (1916).

2 *Khojas and Memon's case* (1817) Perrys O. C. 110. *Khatubai v. Mahomed Haji Abu* (1923) 53. I. A. 108.

A Cutchi Memon can bequeath his entire property by will. Vide *Advocate General v. Timbabai* 41. Bom. 181 (1915).

3 *Skinner v. Orde* 14. Mad. I.A. 309 (1871 *Skinner v. Skinner* 25 Cal. 537 (1897). *Nandi v. The Crown* I, Lah. 440. (1920).

4 12 Weekly Reporter, 344—7,

5 10 Calcutta, 1123.

6 25 Calcutta, 9,

the Court observed: "It would be wrong for the Court on a point of this kind to put their own construction on the Quran in opposition to express ruling of commentators of such great antiquity and high authority." Thus the opinion expressed by the Bench is indecisive. But if the Privy Council and the Indian High Courts consider themselves (as they really are in fact) to have displaced the Muhammadan tribunals, Kazis and Muftis, then it is submitted, that the development of Anglo-Muslim Law ought not to be hampered by any consideration, it is to be developed on the principle of equity and good conscience with due regard to the state of society and circumstances of the country. The principle of *Ijtihad* has been the avenue for the development of the Muslim Law, and that can always be applied to develop Anglo-Muslim Law to suit the requirements of the time. Law is the product of the entire history of the people. It is an evolution by an organic growth.

CHAPTER I

THE DEVELOPMENT OF THE MUSLIM LAW OF MARRIAGE.

1. *The Conception of marriage.*

The development of the institution of marriage is a matter of historical interest. It seems to have originated in the form of irregular unions and marital unions.¹ Marriage by capture was the ancient form of securing a wife, and ultimately it gave way to elopement with consent, "a compromise with real capture." The institution of marriage by purchase gradually grew up and this notion of acquisition of a wife, as property, paved the way for marriage by consent, subject to dower. Polyandry, polygamy and even monogamy were enjoined by customs in different parts of the world. Whether the Arabian civilisation passed through these various stages is a matter of speculation and conjecture for the historians. The advent of the Prophet of Islam marked a triumphant period, the old social structure of the Arabian culture vanished, and was replaced by a series of new ideas and new conceptions.

Under Muslim Law *nikah* marriage, literally means to unite, it cannot be effected except by its pillar *rukū* emanating from *ahl*, one who is competent to contract and in reference to *mahl*, fit subject of marriage. The Muslim jurists treat *nikah* both as a civil contract and a religious duty,² it is a devotion, and act of *ibadat*,

¹ "Marital Unions are the outcome of sexual selection and restrictions." Vinogradoff Historical Jurisprudence Vol. 1 p. 167.

² Story conflict of Laws p. 148. "In many civilised countries.....it has had the sanctions of religion superadded. It then becomes a religious, as well as a natural and civil contract; for it is a great mistake to suppose that because it is

piety, and there is consensus of opinion among them, that marriage is a *Sunnat nuwakiddah*.¹ Several authors of Anglo-Muhammadan Law apparently under the influence of the modern conception of marriage or perhaps by reason of singular characteristics of the Muslim Matrimonial Law have defined it simply as a civil contract. Ballie says. Marriage is a contract which has for its design or object the right of enjoyment and the procreation of children."²

Sir Rolland Wilson defines it thus "Marriage is a contract for the purpose of legalising sexual intercourse and the procreation of children."³

Mr. Shama Charan Sircar says, "Marriage among Muhammadans is not a sacrament, but purely a civil contract....."⁴

Mr. Justice Syed Mahmud says, "Marriage is a civil contract upon the completion of which by proposal and acceptance, all the rights and obligations which it creates, arise immediately and simultaneously."⁵

These definitions only represent one aspect of the Muslim marriage ; they ignore its ethical importance, and its religious value, they fail to realise the close and intimate connection between religion and law in the Muslim faith. *Nikah* is an institution legalised for manifold objects such as preservation of the species, the fixing of descent, restraining men from debauchery, the encouragement of chastity, the promotion of love and union between the husband and wife, and of mutual help in earning livelihood. In my opinion Mr. Abdur Rahim has correctly observed, "The Muhammadan jurists regard the institution of marriage as partaking both of the nature of '*ibadat*' or devotional acts and '*muamalat*' or dealings among men."⁶ The latter view closely resembles the celebrated definition of Modestinus, "Nuptiae sunt

¹ Sunnat Muwakiddah is thus defined: "The person who complies with it, is rewarded in the next world, and he who does not commits a sin."

² Digest p. 94.

³ Anglo Mohammadan Law, p. 94.

⁴ Tagore Law Lectures, 1873.

⁵ Abdul Kadir v. Salima, 8 All. 149.

⁶ Muhammadan Jurisprudence, p. 327.

coniunctio maris et feminae et consortium omnis, vitae divini et humani juris communicatio,"¹ and is in complete accordance with the famous *hadises*, traditions, of the Prophet.

"Marriage is my sunnat and those who do not obey it are not my followers."

"A woman is married owing to four qualifications, for her property, or nobility of degree, or beauty or on account of piety. Ye should marry for piety."²

The following definition is suggested, though as far as Anglo-Muslim Law is concerned the judicial pronouncement by Mr. Justice Mahmood in *Abdul Kadir v. Salima* 8 All. 149 may be taken to be decisive, that the Muslim marriage is purely a civil contract.

"*Nikah* though essentially a contract is also a devotional act, its objects are the right of enjoyment, procreation of children and the regulation of social life in the interest of the society."³

The transition from the sacramental indissolubility of marriage to the treatment of marriage, as a civil institution, is a modern idea. And we may say that it is a logical development of Anglo-Muslim Law. Marriage is nothing more nor less than the voluntary union of one man and one woman.

§ 2. *The age for Consummation of Marriage.*

Marriage is contracted by a proposal made by one of the contracting parties and accepted by the other. Under the Muslim Law, the marriage may also be contracted by the agent of one or of the both of the parties and if the parties are minors by their lawful guardians. For the purpose of marriage the term minority means immaturity, and in default of evidence as to attainment of puberty a minor is deemed to have attained puberty on the completion of

¹ Dig. 23-2-1.

² These famous 'hadises' are quoted in almost all books on traditions.

³ For a full discussion vide "The Muslim Law of Marriage" by the present author pp. xvii—xxiii and pp. 1-2.

Mt. S. Vesey-Fitzgerald in his recent work *Muhammadian Law*, p. 37. says, "Although a religious duty, marriage is emphatically not a sacrament. There are no sacraments in Islam. Nor is it coverture."

his or her fifteenth year.¹ Hence it is open to the parties to terminate their own minority, but Anglo-Muslim Law has affected this branch of the Muslim Law as to consummation of marriage. The Age of Consent Act X of 1891 raised the age-limit from ten to 12 years. "Sexual intercourse by a man with his own wife the wife not being under twelve years of age is not rape." Recently the Indian Penal Code amendment Act No. XXIX of 1925 has further amended Sections 375 and 376 of the Code. It has raised the age from twelve to fourteen and thirteen. Thus the exception to S. 375 would now read, "Sexual intercourse by a man with his own wife the wife not being under *thirteen* years of age is not rape."

However "Sexual intercourse by a man with his own wife is not rape although the wife has not attained the age of thirteen years if he was married to her before the date on which this Act came into operation and she had attained the age of twelve years on that date." The Act XXIX of 1925, came into force on September, 23rd 1925. In the case of non-married women the age has been raised from twelve to fourteen. It is submitted that this legislation is in harmony with the Muslim Law, which lays down the rule that no person is entitled to have recourse to his wife of immature years without regard to the question of safety of her person. It is only at the age of fifteen years that there is a conclusive pre-sumption that both the males and females have attained puberty²

Under the Child Marriage Restraint Act XIX of 1929. The "Child Marriage" is made penal, though it is not prohibited, and the term "child" means a person who, if a male, is under eighteen years of age, and if a female is under fourteen years of age.

1 *Atkia Begum v. Muhammad Ibrahim* 1916, I. C. 20. (P. C.) *Yusuf v. Mt. Zainab* 1928 Lah. 102.

2 In statement of Objects and Reason, Gazette of India 1924 Part V. P. 49. Bill No. 12 of 1924, it is stated "Books of Medical Jurisprudence establish the fact that the age of puberty in India is attained by a girl upon her reaching the age of fourteen. Even though puberty may be reached at that age it is obvious that girls are unfit for sexual cohabitation till they are older and more developed in physic and strength. The appalling infant mortality in the country is partially ascribed to early marriages and the consummation which follows with immature girls. It is therefore, not only for the protection of minor girls as also of their progeny that the age of consent should be raised to at least fourteen years."

Under section 3, a male person above 18 and under 21 is punishable with fine upto Rs. 1,000, and under section 4, a male above 21 is punishable with simple imprisonment upto one month, or with fine upto Rs. 1,000 ; and under sections 5 and 6, persons interested in "child marriage" are punishable with simple imprisonment upto one month or with fine upto Rs. 1,000 or with both.

These two enactments are social legislations and incidently affect the Muslim Law, though they were not enacted to interfere or supersede it.

§ 3. *Marriage with Ahl-i-Kitab.*

The Holy Koran says, "And ye are also allowed to marry free woman that are believers, and also free women of those who have received the Scriptures before you, when ye shall have assigned them their dower; living chastely with them, neither committing fornication nor taking them for concubines" Part VI Ch. V).

Under the Muslim Law a Muslim male person is entitled to marry *Ahl-i-Kitab* a follower of a divine faith, but a Muslim woman is not permitted to marry a non-Muslim. As regards the term *Ahl-i-Kitab* it is admitted that the followers of the Prophets mentioned in the Koran are without doubt members of a divine faith., *viz.*, the Jews and the Christians.

In British India the marriage between a Muslim and a Christian woman must be contracted in presence of the Registrar appointed Under the Christian Marriage Act XV of 1872. In my opinion such marriages could also be contracted under the general Muslim Law prevalent in British India. However this Act does not enable a Muslim woman to contract marriage with a Christian husband, for such a marriage would be opposed to her personal Law and S. 88 of the Act would make it void.

A marriage between a Muslim and an *Ahl-i-Kitab* celebrated in a foreign country, performed according to *lex loci contractus*, is valid under the Muslim Law also. And under the Muslim Law the domicile of the husband would be domicile of marriage, though according to *Jus Gentium*, mere fact of marriage does not

neccessarily imply that the wife has abandoned her own domicile. However in *Harvey v. Farnie* 8 App. Cas. 43 it was decided that where "an English woman marries a domiciled foreigner the marriage is constituted according to the *lex loci contractus* but she takes his domicile and is subject to his law." And in the *King v. the Superintendent Registrar of Marriages, Hammersmith Ex-parte Mir Anwar-ud-din* I. K. B. (1917) 634 the Court referring to *Harvey v. Farnie* observed that "the recognition by English Law of the dissolution by the law of the matrimonial domicile of a marriage contracted in England depends upon the principle of recognising the law of the forum and the matrimonial domicile when they both concur. In the present case the law of the forum, that is of the Courts of the Empire of India admittedly does not assist the applicant....."

It was held in this case that a marriage contracted in England between a Muslim domiciled in India and a Christain woman cannot be dissolved by the husband handing to the wife a "writing of divorcement" *talak-nama*, which is the appropriate mode of dissolving the marriage according to the Muslim Law. The reason is obvious it was contended that "A Mahomedan marriage is according to English Law no marriage. It is a polygamous marriage, while English Law only recognises the marriage for life of one man to one woman: *Hyde v. Hyde and Woodmansee* (1866). L. R. I. P. and M. 130. The result is briefly this that a marriage contracted between a Muslim domiciled in India and a Christian or any woman is valid in England, but on the authority of the above cited cases it certainly cannot be dissolved in England and also not in India. I do not agree with the latter view under the Muslim Law, it certainly can be dissolved in India and the divorce would be effective. I personally think that it should be deemed to be valid in England since the English Law recognises the principle of the law of the form. Though the Court in I. K. B. (1917) 634 have thought that even the law of the forum does not assist the petitioner in that case. To sum up the position briefly is this, while in such a case the divorce is effective in India the parties if they should return to England, would find themselves in an embarrassing position as husband and wife, and it is clear that they

cannot contract a new marriage in England on the basis of the divorce in India. *vide* the *King v. Naguib* L. K. B. (1917) 359 and also L. K. B. (1917) 634.

§ 4. *Concubinage and Bigamy.*

The slavery Act V of 1843, has abolished slavery and has removed all legal disabilities due to slavery. It has also incidentally affected the Muslim Law where marriages with slaves are permissible. The debased form of marriage by purchase was the institution of buying females to serve as slaves and concubines. Strictly speaking Islam does not permit simple concubinage. In the Koran it is clearly indicated that marriages should be solemnised.¹

The abolition of slavery throughout the World had a far reaching effect, and British India is by no means an exception. The purchase and disposal of any person as a slave, and habitual dealing in slaves is punishable under sections 370 and 371 of the Indian Penal Code Act XLV of 1860.

According to Sec. 494 of the Indian Penal Code, Act XLV of 1860, "whoever, having a husband or wife living, marries in any case in which such marriage is void by reason of its taking place during the life of such husband or wife, shall be punished with imprisonment of either description for a term which may extend to seven years and shall also be liable to fine." In the first instance this section does not apply to the Muslim males who are allowed to marry four lawful wives, but it certainly applies to Muslim females, *e. g.*, if a Muslim married woman marries another person. The cases of marriages during the period of *iddat* have come up before the Indian High Courts. It has been held that a Muslim woman marrying again within the period of *iddat*, during the lifetime of her husband, is not guilty of bigamy.²

¹ Vide the Koran Part V Ch. IV.

² *Sbeha* (1907) Bom L. R. J. 207.

Musst Bibi P. R. No. 48 of 1882.

Abdul Gani v. Azizul Haq, 39 Cal., 409 (1911).

CHAPTER II

DOWER.

1. *History.*

Marriage by capture is a form of marriage of dominion. McLennan thinks that "Marriage by capture arose from the rule of exogamy." Westermarck suggests that "the practice of capturing women for wives is due chiefly to the aversion to close intermarriage.....together with the difficulty a savage man has in procuring a wife in a friendly manner without giving compensation for the loss he inflicts on her father."¹ Thus later on real capture was supplemented by purchase. The contract of purchase is later on subject to well understood or specified conditions, the kin of the woman attempt to maintain authority over the bride with a view to secure her welfare, and consider themselves under obligations to revenge her ill-treatment. The ancient Greeks used to purchase wives and in ancient India the *asura* form of marriage by purchase was prevalent. It is still common in some parts of India, and very curiously it is even now alleged to be practised by the Indian Muslims in the Punjab. *In Abbas Khan v. Nur Khan*. 1 Lah 574 the custom of purchasing a bride was held to be prevalent among the Pathans, though it was unenforceable on the ground of it being opposed to public policy.

Historically the Muslim institution of dower may be traced to the bride's purchase price, yet it would be incorrect to describe it purely as a bride-price. Mr. Justice Mahmood minimised its significance when he observed, in 8 All. 149 that "Dower may be regarded as consideration for connubial intercourse by way of analogy to the contract of sale." And further he compared marriage and dower with the contract of sale thus : "The right to resist her husband, so long as the dower remains unpaid is analogous to the lien of a

¹ The History of Human Marriage p. 889.

vendor upon the sold goods, while they remain in his possession and so long as the price or any part of it is unpaid, and her surrender to her husband resembles the delivery of the goods to the vendee....." His Lordship's remarks whatever value they may have as a judicial pronouncement do not accurately represent the essentials or the true nature of the institution of *mahar*, dower. Mr. Seymour Vesey-Fitzgerald has observed, "It would be incorrect to describe the Muhammadan dower purely as a bride-price."¹

Strictly speaking it would also be incorrect to say that dower is a consideration of marriage, it is really, according to the Muslim jurists, treated as a consideration of *buza*, enjoyment of the private parts of a woman. Mr. Abdur Rahim accordingly says, "It is not a consideration from the husband for the contract of marriage, but it is an obligation imposed by the law on the husband."² Baillie defines dower to be "the property which is incumbent on a husband, either by reason of its being named in the contract of marriage, or by virtue of the contract itself, as opposed to the usufruct of the wife's person.....Dower is not the exchange or consideration given by the man to the woman for entering into the contract ; but an effect of the contract, imposed by the law on the husband as a token of respect for its subject the woman."³ Thus Baillie says. "It is a token of respect for its subject the woman," and Hamilton in his translation of the Hedaya says, "The payment of dower is enjoined by the law merely as a token of respect for its object the woman".⁴ Maulvie M. Samee Ullah has pointed out that the Arabic expression correctly rendered into English is a token of respect for the "*mahal*" which term refers to the private parts of the woman and does not stand for the woman.⁵

Under the Muslim Law even if no dower has been fixed or it has been expressly agreed that there should be no dower, nevertheless

1 Muhammadan Law, p. 62.

2 Muhammadan Jurisprudence, p. 334.

3 Digest, p. 91.

4 Hedaya (Grady) p. 44.

5 Muhammadan Matrimonial Law, pp.

the wife would be entitled to her 'proper dower of her equals,' such would be the dower as assigned to her relations on her own father's side. Therefore it is not right to treat dower as the consideration for marriage.

§ 2. *Judicial Development.*

The dower is generally agreed as partly prompt and partly deferred, but if there is no specification at the time of marriage as to what part of the dower is prompt or deferred, then the presumption would be in favour of the amount usually paid as prompt dower to women of equal status of the wife's family. The Privy Council following Macnaghten¹ Art 22 treated the whole dower as prompt vide *Mirza Bedar Bakht v. Muhammad Ali*, 19 W.R. 315 (1873). Incidentally it correctly lays down the *Shia* Law on this point and the parties in this case were Shias, though the Privy Council took no notice of this fact. This case as a matter of course was followed by the Madras High Court in *Tadiya v. Hasanebiyari* 6 Mad. 371 (1900) and *Masthan Saheb v. Assan Bibi* 23 Mad. 371 (1900). The Allahabad High Court has avoided this decision and followed the correct Muslim Law in *Umda Begum v. Mohammadi Begum* 33 All. 291 (1910). In *Fatma v. Sadruddin* 2 Bom. H. C. 291 (1865) a third of the dower was treated as prompt. In *Maimuna Begum v. Sharafat Ullah* 1931. A. L. J. R. 197 the claim for one-half of the dower as prompt was allowed.

Under the Muslim Law, a Muslim wife who has attained puberty is competent to remit her dower in favour of her husband, but this view was not accepted by the Madras High Court in *Ali Dhunimsa Bibi v. Muhammad Fatihaddin* 41 Mad., 1026 (1918) where it was held that a remission by a wife who had attained majority according to the Muhammadan Law but not under the Indian Majority Act IX of 1875 is invalid. Though it may be difficult to support this

Remission of
dower.

view under Muslim Law, nevertheless it is perhaps a legitimate expansion of it, since a woman under 18 years may be taken to be in need of some protection to safeguard her interests. Again Anglo-Muslim Law has limited the idea of absolute free consent in holding that relinquishment in great mental distress is not valid, vide *Nurannessa v. Khaje Mohamed* 47 Cal. 537 (1920). The obligation to pay dower is enforceable under the Indian Contract Act 1872 and is also remissible under S. 63 of that Act.

The whole principle of the widow in possession of her husband's property in lieu of dower and allowing her interest on her unpaid dower is the result of judicial development of Muslim Law. The Law has become more settled and decisive since the decision of the Privy Council in *Maina Bibi v. Chaudhri Vakil* 52. I. A. 145, 47 All. 250 (1925). The allowing of interest was the most subtle point, since the Holy Koran expressly prohibits taking of interest. However, the Allahabad High Court in *Hamira Bibi v. Zubaida Bibi* 33 All. 182, vide also 38 All. 581 P. C. (1916), 43 I.A. 294, made the Interest Act XXXII of 1839 applicable, and allowed interest to the widow in respect of her dower. In my opinion it is only fair and equitable to allow interest in every case though in *Nawsi Begum v. Dilafrooz Begum* 48 All. 803 (1926), the Court observed that "the disproportion between the value of property and the amount of the dower is a good ground for holding that interest cannot be equitably allowed."

The whole of this part of law is briefly this. The widow's claim for dower entitles her to obtain in a peaceful manner, lawfully, and without fraud possession of the whole or part of her husband's property, and she is entitled to remain in quiet possession, until her dower debt is completely paid up. She is not allowed to transfer the property by sale, gift or mortgage. She is entitled to charge a reasonable amount of interest on the dower debt hitherto unsatisfied. She is bound to render an account to her husband's heirs of the income of the property on their demand for an account. And that the heirs may demand an account repeatedly and their suit is not bared by *res judicata*, vide *Maina Bibi v. Chaudhri Vakil* 52 I.A. 145. That on discharge of the dower debt the property would

be restored to her husband's heirs, in which capacity the widow ofcourse is also entitled.

3. *Legislative Development.*

There is no period of Limitation under the Muslim Law. The Indian Limitation Act 1908 Sched. I applies to suits for enforcement of claims to dower. According to

Period of Limitation.

Arts 103 and 104 in the case of deferred dower the period of limitation is three years from the date of dissolution of marriage by death or divorce, and for a suit to enforce payment of prompt dower it is three years from the date of demand and refusal, and if no demand has been made during the subsistence of the marriage then it is three years from the date of dissolution of the marriage. In *Ameeroonnissa v. Mooradunnissa* 6 Moo. I. A. 211 (1855). An attempt was made to argue before the Privy Council that the wife's right to claim prompt dower should be declared time barred by her non-demand during the continuance of the marriage, but their Lordships were not prepared to accept this view, observing that the repetitions of such demands by the wife would lead to matrimonial unhappiness, vide also *Khajarannissa v. Risaannissa* 2. I. A. 235 (1875).

In the Province of Oudh there has been a direct interference with the Muslim Law by the Oudh Laws Act Sec. 5 (1876)

Excessive dower

and the same is provided by the Ajmer-Merwara Laws Regulation 3 of 1877 Sec. 32. The Law to be applied where the wife claims her dower in her husband's lifetime or after his death, the Court is to allow only such amount as appears to be reasonable with reference to the means of the husband and the status of the wife. These enactments are of great significance, and in my opinion are in harmony with the doctrine of *assumat* which means announcement in public of large dower with the object of self-glorification, while in private the parties fix a moderate amount. The Hanafi view is that when a contract is made in private and the parties are agreed as to the exact amount, then the private arrangement will hold good inspite of the public announcement. But in case of disagreement and insufficiency of evidence, the woman asserting that the public

announcement is right, the dower will be as announced publicly. The Oudh Laws Act and the Ajmere-Merwara Regulation of course have gone much further and have undoubtedly materially affected the Muslim Law. However the mere fact of a marriage being contracted in Oudh does not authorise abatement in the stipulated dower, if the parties are not domiciled in Oudh *vide Zakeri Begum v. Sakina Begum* 19 Cal. 689 (1892). *Rukia Begum v. Muhammad* 32 All. 477 (1910).

CHAPTER III

DIVORCE.

The laws determining separation of the married parties are equally interesting as the history of marriage itself. In a sacramental marriage there is no divorce. The man and his wife are made "one flesh by the Act of God." "*Quod Deus conjunxit, homo non separet.*" Later on for the separation of the parties the Cannon Law, required the decree of nullity '*annulatio matrimonii*,' the fiction that the marriage never existed. Similarly since under the Hindu Law marriage is a sacrament the laws of Manu provided no divorce.¹

We have held the view that under the Muslim Law the marriage though essentially a contract is also a religious duty. The Prophet says, "Of all the permissible things, divorce is the most detestable," Thus it is tolerated and permitted as a necessary evil, and perhaps justifiable in special circumstances. Baillie accordingly says, "It was originally forbidden and is still disapproved, but has been permitted for the avoidance of greater evils."²

The term *talaq* signifies the dissolution of marriage. It is usually effected by the act of the husband or by the operation of law and in certain circumstances by the act of the wife also. There are several kinds of divorce all of which need not be discussed here, Anglo-Muslim Law has considerably affected judicial rescission of contract *faskh*.

1 "Neither by sale nor by repudiation is a wife released from her husband" IX, 46.

2 Digest p. 205.

§ 2. *Judicial Development.*

There is no special form of divorce, all that is necessary, is that the words of divorce pronounced by the husband should show an intention to dissolve the marriage. Vide *Wahid Khan v. Zainab Bibi* 36 All. 458. (1911).

Form of divorce.

The Muslim jurists give a number of interesting and perplexed instances, very far fetched in their meaning and effect.¹ Mr. S. Vesey Fitzgerald considers that "the supersession of the Moslem law of evidence renders these obsolete."²

As regards the law of option of puberty or repudition *Khiyar-ul-bulugh*, Anglo-Muslim Law, has considerably advanced. *Khiyar-ul-bulugh* is the right vested in a minor to ratify or rescind on attaining puberty the marriage contracted on his or her behalf during minority by any other person except his or her father or paternal grandfather. The option of repudiation must be exercised by a female minor *immediately* on attaining puberty and a male retains the option until an express declaration or by his conduct or otherwise, e.g., by payment of dower. The decisions of the Court have modified the effect of the term *immediately*. The Allahabad High Court has held that a woman's right of option is prolonged, until she is acquainted with the fact that she has such a right. In other words if she does not know that she has a right of rescinding the marriage, she will have the power to do so, when she becomes aware of it; vide *Bismillah Begam v. Nur Muhammad* 19. A. L. J. R. 845 (1921) 44 All. 61. (1922). It is difficult to support this view for the ignorance of law is not an excuse under the Muslim Law. Again the word *immediately* is not strictly interpreted vide *Khanoo v. Bhag Bhasi* 76. I.C. 45 (Lah 1923) the test being has the girl acquiesced.

Option of puberty.

And in the case of a *Shi'a* minor's marriage by her father with a *Sunni* husband, the Allahabad High Court has stretched a point in holding that the woman retained the option of puberty on the

¹ e. g. "You are single." "See to the purification of your womb." "Count your lunar courses."

Muhammudan Law 73.

ground that a marriage with a *Sunni* husband is abhorrent for a *Shia* woman according to her personal law. Vide *Azis Bano v. Mohamnad* (1925) 47 All. 823.

Ameer Ali takes the view¹ that if the woman after exercising the option were to marry again, she would not be guilty of bigamy *Badal Aurat v. Queen Empress* 19 Cal. 79 (1891), *Bulande v. K. E.* 8. 1. C. 494 (Punjab 1910). Under the Muslim Law a decree of Court conferring the fact of exercise of the option of puberty is essential, but according to Ameer Ali it is not necessary at all.

Under the Muslim Law, if a woman of her own free will contracts an unequal marriage then her father or other near relations is entitled to move the Court to grant judicial divorce annulling the marriage. This was so held in *Mohumdee v. Bairam* 1 Agra 130 (1866), but the whole law of equality of marriages may be taken to have been superseded by the decision of the Privy Council in *Atkia Begum v. Muhammad Ibrahim* 36 I. C. 20 (1916) to the effect that an adult woman can marry a man of her own choice despite family opposition. This view is in harmony with the spirit of the Muslim religion. At the time of the Holy Prophet there was no such distinction, and several unequal marriages were contracted. The doctrine of equality prescribes a social bar and Islam as a religion is opposed to it,² but some jurists treat it as an integral part of the Muslim Law.

The Muslim Law of *Li'an* has been misunderstood and misapplied by the Courts in India. An attempt is here made to explain the law with reference to judicial decisions and development of Law.

¹ Mohammadan Law Vol. II p. 375.

² Sir Henry Maine 'Early Law and custom' p. 224, observed, 'The outer or endogamous limit, within which a man or woman, must marry, has been mostly taken under the shelter of fashion or prejudice. It is but faintly traced in England, though not wholly obscured. It is (or perhaps was) rather more distinctly marked in the United States, through prejudices against the blending of white and coloured blood. But in Germany certain hereditary dignities are still forfeited by a marriage beyond the forbidden limits and in France, in spite of all formal institutions, marriages between a person belonging to the noblesse and a person belonging to the bourgeoisie are wonderfully rare, though they are not unknown.'

When the husband makes a statement accusing his wife of adultery, *zi'na*,¹ the procedure for the settlement of the accusation, by swearing and imprecating upon them the curse of God, is technically known as *Li'an*.

Baillie says :—"Li'an are testimonies confirmed by oaths on both sides, referring to a curse on the part of the man, which is a substitute for the ' hudd-oo-kuzf, or specific punishment for scandal, and for the ghuzab or wrath on the part of the woman, which is a substitute for the ' hudd-oo-zina ' or specific punishment for adultery "2

It is reported in Al-Bukhari per ibn Abbas that the occasion for the revelation of the Koranic verses laying down the law was at the trial of Hilal bin Umayah. Hilal had accused his wife of adultery with Sharik bin Sahama. Hence he was called upon to produce witnesses or be prepared to receive the prescribed punishment of eighty stripes.³ Thereupon Hilal exclaimed: "I am truthful and God will save me from being flogged." It was on this occasion that the following Koranic verses were revealed:—

The Koran, Part XVIII, Ch. XXIV.

" Those who accuse their wives, but have no witnesses except their own selves, then their evidence is to witness by God four times that they are truthful, and the fifth time that the curse of God be upon them if they be liars."

The Holy Koran also gives a chance to the wife to rebut her husband's oath, precisely in the same manner.

The Koran, Part XVIII, Ch. XXIV.

" But it will avert the punishment from her, if she will testify by God four times that he is a liar. And the fifth time that the wrath of God be upon her, if he be truthful.

In accordance with these verses of the Koran the Muslim jurists have evolved a systematic law of *Li'an*, specific oaths are to

1 The Muslim jurists use the term 'zina' as covering all kinds of unlawful sexual connections whether incest, fornication, whoredom or adultery.

2 A Digest of Mohammedan Law, p. 335.

3 Maulvi Muhammad Yasoof (Tagare Law lectures) Mahomedan Law, Vol. I, p. 128. The Koran, Part XVII, Ch. XXIV.

" Those who accuse chaste women and do not bring four witnesses, scourge them with eighty stripes, and do not receive their testimony for ever for they are surely sinners."

be administered, and these formalities are essential to complete *Li'an*.

Briefly the following points are essential :—

1. *Li'an* is only applicable in the case of a *sahih*, valid, marriage, there is no *Li'an* in a *fasid* marriage. It is to be taken between the spouses once only. And the parties must possess all necessary qualifications of a competent witness.¹ The wife must be reputed to be of good character.

2. An accusation of adultery to the wife, if proved to be false would make the husband liable to receive the *hadd* punishment of eighty stripes.² But if proved to be true would make the wife liable to receive *hadd* punishment of one hundred stripes.³

3. If the husband cannot tender requisite evidence, there being no four witnesses to prove adultery or none at all except himself then it is open to him to take the oaths of *Li'an* and if the wife declines to take the oaths then she would become liable to *hadd* punishment, and if she also takes the oaths then the Kazi (Court) must separate them notwithstanding the fact that the parties are willing or unwilling to be separated.

4. The judicial divorce takes effect on the compliance of the formalities of *Li'an* the actual taking of oaths,⁴ and the legal effect is that both the parties avoid being punished and connubial intercourse becomes unlawful, but if the husband acknowledges that his accusation was false, or retract his accusation, then though he becomes liable to receive the punishment, sexual intercourse again becomes lawful.

1 That is a minor, an insane person, or a dumb or a person convicted of delicts cannot make *Li'an* at all.

2 In British India he would be criminally liable for defamation or he may be sued for damages in the Law of Torts.

3 The Koran, Part XVIII, Ch. XXIV.

The where and the whoremonger shall ye scourge with a hundred stripes

Under the Muslim Law the alternative punishment is imprisonment, but in British India the woman goes scot-free there being no punishment for conjugal infidelity.

4 It should be noted that the oaths cannot be exacted from the husband

"It is requisite to exact an oath from the defendant in all these case, excepting in the case of punishment or of the *laan*"—Hamilton's *Hedaya* (Grady), Book XXIV, Ch. II of Oaths.

5. Until the marriage is dissolved the parties retain *inter se* the right of inheritance and all other rights. The separation due to *Li'an* is equivalent to *Talaq-i-Bain* irrevocable divorce.

6. Under the Hanafi Law the parties may remarry on the transpiry of any fact which would have prevented the taking of oaths of *Li'an*, i.e., if the husband were to acknowledge that his accusation was false and was punished. Under the Shia Law and the Shafi Law and the Maliki Law the parties cannot remarry.

7. *Li'an* cannot be performed by the agent. It does not admit of forgiveness nor can the wife compromise in lieu of some property. *Li'an* is also resorted to disclaim paternity of the child born to the wife.

Strictly speaking the formalities of *Li'an* are a part of the adjective law, and hence it would be difficult to apply them under the law in British India. But it is submitted that inasmuch as the Muslim Law makes no sharp well defined distinctions in the substantive Law and in the adjective Law, therefore under Anglo-Muhammadian Law the formalities of *Li'an* should be treated as a part of the substantive Law, at least on the same footing as the formalities of pre-emption are deemed essential.

Where is the oath to be administered? and who would be responsible for conducting the proceedings, and under what Law? These are some interesting questions which a student of the Anglo-Muhammadian Law has to solve for himself. It may be suggested that the Kazi in the present day is replaced by the Court. And since the Muhammadan Law of evidence is no longer in force, consequently the Courts in British India, on being satisfied according to the rules of evidence of the Indian Evidence Act, that a false accusation of adultery was made by the husband, would pass a judicial decree of separation. The formalities of *Li'an* need not be complied. But this view is obviously not in conformity with the Muslim Law. And again if the Court makes an effort to take advantage in some way of the Indian Oaths Act 1875, that is to administer a special oath under Section 8, then our difficulty would be, that neither the husband nor the wife have offered to be bound by the oath, as contemplated by Section 9 of the Oaths Act, and this fact would prevent the oath of

either of them being conclusive proof under Section 11 of the same Act.

There appears not to be many reported cases on *Li'an*. There is a very old case, *Jaun Beebee v. Sheikh Moosbee, Beparee*, [1865] 3 W. R. 93 to the effect, "A charge of adultery by a Mahomedan against his wife does not operate as a divorce, though, if false, it might be an item of ill-usage towards making up a sufficient answer to his claim for restitution of conjugal rights." There are two cases reported in the Allahabad series. *Zafar Husain v. Ummat-ur-Rabman*, [1919] 41 All. 278 and *Rahima Bibi v. Fazil*, [1926] 48 All. 834. It was held in the former case 41 All. 278 :

"That a Mahammadan wife is entitled to bring a suit for divorce and obtain a decree for dissolution of marriage on the ground that her husband has falsely charged her with adultery."

And in 48 All. 834, an attempt was made by the husband to retract his accusation somewhat in an ambiguous form, but the Court was not prepared to accept such a retraction. There is also a case decided by the Lahore High Court, *Mohammad Husain v. Begum Jan*, 93 I. C. 1017 (1926).

It should be noted that in all these cases the formalities of *Li'an* were not complied with therefore strictly speaking, the decisions are not in conformity with the Muslim Hanafi Law. The fact of swearing and imprecating the curse of God are very solemn formalities, and it is the oaths alone which make it imperative for the parties to be separated by a judicial decree. This is the view of the Fatawa-i-Alamgiri, and special words must be used, mere swearing is not sufficient.

And further the Muslim jurists simply speak of accusation and its consequences as entitling ultimately to judicial divorce, that is, whether the accusation has been established to be false or true, if the formalities of *Li'an* have been complied with, the wife would be entitled to judicial divorce. But if the accusation has been proved to be a true one, and there has been no *Li'an*, then she would be punished. Thus according to the Muslim Law the accusation may be false or true, the important point is the taking of the prescribed oaths of *Li'an*. However the Indian High Courts have

been carried away by the idea of false accusation. The Allahabad High Court speaks of false accusation only, and in *Khatyabi v. Umra Sahib*, 52 Bom. 295 (1928) the Bombay High Court has gone to the extent of rejecting the view of Sir Roland Wilson to [the effect :

“ The fact of the husband having (whether truly or falsely) charged his wife with adultery will (probably) entitle her to claim a judicial divorce, without prejudice to any proceedings for defamation which she may be advised to institute, and independently of the result of any such proceedings. (Anglo-Muhammadan Law, p. 148).¹

It is to be regretted that Ameer Ali² having laid down the law correctly finally confuses the issue with accusation being false as if in every case. But why confuse between the accusation and the oaths of *Li'an* for they are quite distinct. I have no intention to defend Wilson at all, but in my opinion there is one aspect of the question which may show that Wilson was not wrong though not quite clear in his expression and choice of words. I beg to submit that the Law of *Li'an* has not been correctly applied in any of the above quoted cases decided by the Indian High Courts. According to the Muslim jurists *Li'an* is only to be resorted when the husband finds that there are no witnesses of the fact of adultery except himself, or that since he is unable to produce four witnesses, he volunteers to take the oaths of *Li'an*³ and if the wife also takes the oaths it would make it imperative for the Kazi to dissolve the marriage. It should be remembered that after *Li'an*, the Kazi is to dissolve the marriage irrespective of the fact that either party or both of them desire to remain united in matrimony. Consequently it is absolutely immaterial whether the husband was really truthful or not. Thus according to this view “ the fact of the husband having charged his wife whether truly or falsely ”

1 Mr. Yusuf Ali in the new Edition 1930 has omitted the word truly, he has also made an error in giving importance to the word “ falsely.” Vide p. 151.

2 Mahommedan Law, Vol. II, (5th ed. 1929), p. 350.

3 “ Under the Shiah Law it is only when the husband has no evidence to offer but his own that he may proceed by imprecation against his wife. Under the Sunni Law, he may even when he has corroborative testimony institute the proceeding by *Li'an*”. (Ameer Ali, Mahommedan Law, Vol. II, 5th ed., p. 527. The Koranic texts support this view.

as mentioned by Wilson would entitle her to obtain judicial divorce. By the word "charge" I take it to mean the actual taking of the oaths of *Li'an* and not as mere accusation.

It is clear that the Muslim Law, first of all contemplates a suit either by the husband or more often by the wife, alleging the fact of accusation, and if she is found to be guilty she would be punished or if the husband is found to have defamed her he would be punished, but if the formalities of *Li'an* have been complied, judicial separation will be effected between the parties. And if the husband refuses to make an imprecation or acknowledge the falsity of his accusation, the Kazi will imprison him until he complies with his order. That is, the husband is given a choice either to admit the falsity of his accusation, for this is a right due from him to his wife, in which case of course there is no question of judicial divorce at all, but he (the husband) under the Muslim Law would become liable to receive the prescribed punishment of eighty stripes for scandal, and under the Indian Law the wife would be entitled to institute proceedings under the Criminal Law for defamation, or for damages under the law of Torts. In short, judicial divorce is only pronounced when the husband has taken the oaths of *Li'an*, and in case he is truthful, he will be hoping that his wife would fear God, and in her turn would decline to take the oaths. The result in which case would be that there would be no judicial divorce for the *Li'an* itself was incomplete, and the wife would become liable, under the Muslim Law, to receive the prescribed punishment for *zina*, but in British India she would go scot-free, there being no punishment for conjugal infidelity in the Indian Penal Code. It is respectfully submitted that this is the law according to the Hanafi jurists, and the Courts in British India have not followed it at all. For instance, in 41 All. 278 and in 48 All. 834 no choice was given to the husband to make *Li'an* or to acknowledge falsity of his accusation.¹ In fact the taking of

¹ The Bombay High Court in a recent case (*Ahmad Saliman Vobra v. Mt. Bai Fatma*, A. I. R. (1981) Bombay 76, has observed "that the express opportunity of retraction, even if necessary under the strict form of *Li'an* as laid down under Mahomedan Law, has no place in the procedure in British Courts." This obiter dictum is contrary to the fundamental principles of the Muslim Law of *Li'an*.

oaths was confused with the institution of the suit by the wife alleging the fact of accusation. According to the Muslim jurists these two are quite different things. The institution of the suit and the taking of oaths are distinct, and the consequences of each are quite separate and defined. In other words, mere accusation of adultery by the husband does not entitle the wife to the judicial divorce it is the fact of swearing by witnessing God in the prescribed manner, that makes it imperative for the Court to separate the parties by a judicial decree. It has already been noted that the oaths cannot be exacted from the husband in the case of *Li'an*. The wife of course is entitled to demand from her husband, to substantiate his accusation, and if he declines, the Kazi is to imprison him, until he makes an imprecation, or acknowledges falsity of his charge, but this does not mean that if he is adamant in his refusal to make *Li'an*,¹ the Kazi is to pronounce judicial divorce. The Muslim jurists are quite clear on this point.

Divorce due to *Li'an* is not without its significance, it affects paternity and the wife becomes entitled to demand her dower, therefore, it is submitted, that if *Li'an* is to be treated, as a part of the Anglo-Muhammadian Law, it should be administered in accordance with the Muslim Law.

Under the Muslim Law if a non-Muslim married woman becomes a Muslim then the Kazi should offer Islam to her husband, and if he refuses the parties are to be separated. If the husband accepts Islam then the marriage tie continues to subsist, unless it was contracted within the prohibited degrees. It seems under Anglo-Muslim Law if a married woman on accepting Islam has not obtained a decree of dissolution of her previous marriage, and marries subsequently with another person, then her marriage is void and her children are illegitimate, and she

And in all these cases, since evidence was tendered by both the parties, strictly speaking under the Muslim Law there could be no *Li'an* at all. For *Li'an* can only be taken, when the husband has not produced four or more witnesses or there being none except himself he takes the oaths.

¹ This attitude should be liberally interpreted, it may be the result of a desire to avoid a false oath, or it may proceed from a doubt whether the matter be true or false, or it may be due to uncertainty.

herself would be guilty of bigamy, and under no circumstances can inherit from her father's property.

In the following cases the woman had not followed the correct procedure of giving notice through the Courts to her husband to accept Islam and to have the marriage dissolved,¹ the Courts have pointed out that if such a procedure had been adopted, then separation would have been decreed in the ordinary course, vide *Ram Kumari* 18 Cal., 264 (1891) which contains a fair judgment, but is a case on bigamy. In *Sundari Letani v. Pitambarin* 32 Cal. 871 (1905), a Hindu married woman became a Muslim and married a Muslim, and had sons. She claimed to inherit from her own father, held that she was in a position of an unchaste daughter and was thus disqualified from inheriting her father's property. It raises a very difficult question as to the effect of conversion of a married Hindu woman, for strictly speaking under the Hindu Law there is no divorce. The children of such marriage are also illegitimate under Anglo-Muslim Law, and cannot inherit from their Muslim father vide *Mohammad Shafi-ullah v. Nuhullah*, 23 A. L. J. R. 917 (1925), 88 I. C. 954, (All., 1925) But if a woman obtains dissolution through the Court thereafter she can contract a valid marriage with any Muslim and her children will be legitimate.

When either the husband or the wife apostatises from Islam then the marriage tie is dissolved, but according to some jurists if the woman abjures Islam for a scriptural faith the marriage tie is not dissolved. The latter view is advocated by Ameer Ali C, but the Allahabad High Court in *Amin Beg v. Saman*, 33 All., 90 (1910) expressly dissented from this view. That the apostacy of either party dissolves the marriage was held in *Ghaus v. Faggi*, 29 I. C. 857 (Lah. 1915); *Imamdin v. Hasan Bibi*, P. R. 309 (1906). *Sana-ullah v. Makin* 46 I. C. 719. In *Zuber dust Khan*, 2 N. W. 70 (1870) both the spouses had become Christian without remarrying. The parties of course could contract a fresh marriage under the Christian Marriage Act XV of 1872.

¹ In an old case *Rahmed Bibi v. Rokeya Bibi* 1. Norton's leading cases. Hindu Law p. 12 the mere fact of conversion was taken to dissolve the previous

CHAPTER IV

RECIPROCAL RIGHTS AND DUTIES OF THE HUSBAND AND WIFE.

Anglo-Muslim Law to some extent has affected this part of the Law also. The husband and wife enjoy reciprocal rights and duties, they are both entitled to sue each other for restitution of conjugal rights, and in case of non-payment of prompt dower on demand, the wife is entitled to refuse herself to her husband. This right of refusal exists before and also after the consummation of marriage. The right of refusal is only equitable just and fair, and is in accordance with the opinion of Imam Abu Hanifa, the founder of the Hanafi School,' This is the rule adopted by the jurists and it is stated in Egyptian Code by Kadri Pasha Sec. 213, and also in Baillie's Digest¹ and Hamilton's Hedaya.² And it was followed in a number of cases :—*Abdul Shukkoor v. Raheemunnissa* 6 N. W. 94 (1873), *Bidan v. Mazhar Husain* 1 All., 483 (1879), *Wilayat Husain v. Allah Rakhi* 2 All., 831 (1880) *Jaun Bibi v. Sheikh M. Beparee* 3 W. R. 93, *Nazir Khan v. Umrao* A. W. N., (1882) 96. However Mr. Justice Mahmood in *Abdul Kadir v. Salima* 8 All., 149 (1886) took the view that the wife has no right to refuse to admit her husband after consummation of marriage has taken place, with her consent.³ This decision

¹ p. 125.

² p. 11, iii, 50.

³ For a full discussion vide the Muslim Law of Marriage by the present author p. 82.

Mr. Justice Mahmood in *Abdul Kadir v. Salima* (8 All. 149) observed "it is a general rule of interpretation of the Muhammadan law that in cases of difference of opinion among the jurisconsults Imam Abu Hanifa and his two disciples Quazi Abu Yusuf and Imam Muhammad, the opinion of the majority must be followed, and in the application of legal principles to temporal matters, the opinion of Quazi Abu Yusuf is entitled to the greatest weight." It is submitted that it may be a plausible rule ; but the Hanafi school of

was followed in *Kunhi v. Moidin* 11 Mad., 372 (1888), *Hamid-un-nissa v. Zahiruddin* 17 Cal., 670, (1890), and in *Bai Hansa v.*

Abdullah 30 Bom., 122 (1905). The view taken by Mahmood J. was first attacked by Maulvi Sami Ullah in a judgment delivered

jurisprudence does not sanction it. This obiter dictum cannot be accepted as a legal decisive formula. The Hanafi Muslims universally uphold the view of their founder, the great Imam Abu Hanifa like the Maliki, Shafi and Hambali who follow their own leaders.

The author of *Durrul-Mukhtar* observes, "A mufti should give his final Fatwa in accordance with the opinions of all the Ulemas, if they agree, but if they differ, the jurists are not agreed as to the course which is to be followed. The most approved doctrine is that a Fatwa should generally be given in accordance with the opinion of Imam Abu Hanifa. This opinion is also supported by the *Sirajia* and other books. The opinion of Abu Yusuf should be next acted upon, and then that of Muhammad and then of Zafar and Hasan Ibn Ziad."

Ameer Ali has criticised Mr. Justice Mahmood's view adversely. He says "there is no such fixed rule for over and over and over again Fatwas are delivered in accordance with the opinion of only one." *Mahomedan law* Vol. II p. 499. Sir Roland Wilson also (*Anglo-Muhammadan law*, p. 92) says that "this, however, was a mere personal dictum neither necessary to the decision of the case nor supported by the authorities."

However there are a certain number of principles which are governed by the opinion of the two disciples, and some even by the opinion of Imam Muhammad in preference to Imam Abu Yusuf, e.g. the principles governing the rule of inheritance concerning the distant kindred, where a simple method enunciated by Abu Yusuf was rejected by the "Ulemas" in preference to a complicated system of Imam Muhammad. As regards the creation of waqf (charitable and religious dedications) and its management, all observations made by Abu Yusuf have been adopted in toto by the Hanafi jurists in preference to Imam Abu Hanifa's view and dissenting opinions of Imam Muhammad. The Muslim law of Waqf is a triumph for the juristic exposition of the Hanafi law by Imam Abu Yusuf. It refutes the proposition "that the opinion of the majority must be followed."

The rule of majority advocated by Mahmood J. has not been accepted by the Courts in British India. This view was first criticised by Maulvi Samee Ullah in *Musammatt Rasulan v. Mirza Naim Ullah* and also in *Wajid Ali Khan v. Sakhawat Ali Khan* 15 Oudh Cases 127 (1911). In *M. Azizuddin v. The legal Remembrances*, 15 All. 321 (1891), the Allahabad High Court preferred Imam Muhammad to Abu Yusuf. And in *Bikani Mia v. Shuk Lal Poddar*, 20 Cal. 116 (1893) the same view was taken. However the Rangoon High Court in *Ma E. Khin v. Maung Sein* 2 Rang 495 (1924) preferred Abu Yusuf. In *M. Shafi v. M. Abdul Aziz* 49 All. 391 (1926) the Allahabad High Court again preferred to follow Imam Muhammad.

by himself in *Rasulan v. Mirza Niam Ullah* (published, Indian Press 1891). And recently the Lucknow Judicial Commissioner's Court in *Wajid Ali Khan v. Sakhawat Ali Khan* 15 Oudh Cases 127 (1911) has expressly dissented from the view taken in 8 All., 149. In *Must Hijaban v. Ali Sher Khan*, 64, I. C. 117 (All. 1921) the decree for restitution of conjugal rights was made conditional on payment of prompt dower.

The husband is entitled to institute a civil suit for restitution of conjugal rights against his wife which may result in the attachment of her property, and the wife likewise can institute a suit against her husband.

Restitution of
Conjugal rights.

The Order 21 Rule 32 of the Civil Procedure Code Act V of 1908 has been amended by Act 29 of 1923, the result is that a decree for restitution of conjugal rights can no longer be enforced by detention in the civil prison, but before this amendment it could be enforced by his or her detention in the civil prison in case of failure to obey the decree. Under the present Law the decree may be enforced by the attachment of the property. And rule 33 Order 21 gives to the Court discretion in executing decrees against the husband not being obeyed for restitution of conjugal rights in respect of periodical payments.

This part of Anglo-Muslim Law is absolutely the product of legislative and judicial development, and the general Law in British India has also progressively changed. The disappearance of articles 34 and 35 of the old Limitation Act 1877 Schedule 11, in the Limitation Act of 1908 have considerably affected the general law. According to articles 34 and 35 the period fixed for a suit for, the recovery of a wife, or for the restitution of conjugal rights was two years. It was impossible to put any other construction on these articles and in spite of some previous contrary rulings viz., *Bai Sari v. Sankla Hirachad* 16 Bom. 714, *Binda v. Kaunsilia* 13 All. 126 (1890) the Bombay High Court in *Dhanjibhoy Bomanji v. Hirabai*, 25 Bom. 644 (1901) came to the "conclusion that a suit in this case by a wife for the restitution of her conjugal rights is barred by the lapse of time when restitution has been demanded by her and refused by the husband being

of full age and sound mind more than two years prior to the commencement of the suit." This case was followed in *Saravanai Perumal Pillai v. Poovayi* 25 Mad. 426 (1905) and finally in a Muslim case *Asirunnissa Khatun v. Buzloo*. 34 Cal. 79 (1906) the Calcutta High Court came to the same conclusion. If Articles 34 and 35 had continued in the present Limitation Act of 1908, it would have considerably affected the Muslim Law, it would imply that the legislature intended to make a material modification in the Muslim law of marriage. The view taken in an old case *Gaizni v. Mehran* P. R. XIV 157 (1879) appears to me to be the correct view that "according to Muhammadan Law the unjustifiable withholding of her person by the wife is a breach of the contract of marriage, and a breach which continues so long as her person is so withheld, consequently that a suit of this kind cannot be barred by limitation where the parties are Muhammadans." In this case the Chief Court was considering a similar provision under the Limitation Act of 1871. However it can still be argued that Sec. 120 of the present Limitation Act of 1908 prescribes six months limitation period for suits not otherwise provided for and this may apply to suits for restitution of conjugal rights, but this argument would be met by Sec. 23 and the principle laid down in *Gaizni v. Mehran* cited above. Sec. 23 provides, "In the case of a continuing breach of contract and in the case of a continuing wrong independent of contracts, a fresh period of limitation begins to run at every moment of the time during which the breach or the wrong as the case may be continues."

The cases on the point of restitution of conjugal rights are interesting and they conclusively show that the Courts in British India have been more guided by principles of the English Law. In *Moonshee Buzloor Ruheem v. Shumsoonnisa* 11. Moo. I. A. 551 8. W. R. 3 The Right Hon. Sir James W. Colvile observed: "The Mahomedan Law on a question of what is legal cruelty between man and wife, would probably not differ materially from our own.....There must be actual violence of such a character as to endanger personal health or safety, or there must be a reasonable apprehension of it. The Court as Lord Stowell said in *Evans v. Evans* 1 Hagg. Con. 37 has never been driven off this ground."

In *Mt. Maqboolan v. Ramzan*, A. I. R. 154 (1926 Oudh) the Court held, "Principles of justice, equity and good conscience not inconsistent with any positive rule of Mahomedan Law may well be applied in determining the ground on which a claim for restitution of conjugal rights may be refused by the Courts of Justice." In *Hamid Husain v. Kubra Begum* 40 All. 332 (1918), 16 A.L.J.R. 132, a suit for restitution of conjugal rights, the Allahabad High Court accepted the principle laid down in *Armour v. Armour* I. A. L. J. 318 (1914) as applicable to Muslims and refused to decree the suit since there was ill-treatment on the part of the husband short of physical cruelty, in such circumstances the wife could not be delivered over to the husband vide also *Muhammad Abdul Rahman v. Taslimunnissa* II A. L. J. R. 608. Again in *Khurshedi Begam v. Khursaid Ali* 12 A. L. J. R. 1065, where it was found that the husband has been trying to force his wife to sign deed disposing of her property, and on her refusing to do so, he had been beating her and abusing her. Held that the husband was disentitled by reason of legal cruelty to a decree for restitution of conjugal rights.

Under the Muslim Law the husband has the right to inflict moderate personal chastisement on his wife, but
 Right to chastise. it is doubtful whether this could be exercised as a matter of right under Anglo-Muslim Law. Under the English Common Law the husband enjoys similar marital power of chastisement. The Egyptian Hanafi Code Art 209 similarly admits the husband's marital power of chastisement and correction. It may be admitted that as a rule the wife will never seek the protection of the Court in any case of marital violence, unless it is sufficiently harmful or she has made up her mind to give up the company of her husband. In all such cases, and under the law in any case of exercise of violence, e. g., voluntarily causing hurt or grievous hurt, wrongful restraint, wrongful confinement, the ordinary course for the wife will be to have recourse to the general Criminal Law, viz., sections 317, 323, 339 to 342 of the Indian Penal Code. The remedy is thus available under the general law, and Mahmood J. in *Abdul Kadir v. Salima* 8 All. 149, with reference to resemblances between the English and Muslim Law observed, that "Even under

the former the old authorities say that the husband may beat his wife and if in modern times the rigour of the law has been mitigated, it is because in England, as in this country, the Criminal Law has happily stepped in to give to the wife personal security which the Matrimonial Law does not." It may be argued that since the husband is justified to inflict moderate punishment under the Muslim Law, this case would be covered by section 79 of the Indian Penal Code. "Nothing is an offence which is done by any person who is justified by law in doing it." It is submitted that the expression justified by law refers to law in British India and not to the Muslim or Hindu Law, otherwise the holding of *sati* would be no crime. Hence this argument is untenable.

Under the Muslim Law, fornication by the husband or the wife is punishable with scourging a hundred stripes.
 Wife's Adultery. This prescribed punishment is difficult to be given as the Muslim Law requires four eye-witnesses before the conviction of the accused would be pronounced, and an alternative punishment is imprisonment. However under Anglo-Muslim Law the wife incurs no punishment at all by committing adultery, but her male paramour is liable under section 497 of the Indian Penal Code. The only penalty that can be inflicted on the wife is, that on proof of adultery, the order passed for her maintenance under section 488 of the Code of Criminal Procedure would be cancelled. It may also be noted that under the Indian Penal Code a married man if he has sexual intercourse with an unmarried woman is not liable to punishment, but under the old Muslim Law he would be liable to punishment. In other words in British India the husband and the wife incur no legal penalty criminal or civil by not observing conjugal fidelity. Such a state of affairs was not possible under the old *Shera* and in my opinion Muslim Law has been seriously affected by the general law in British India.

An obedient wife is always entitled to maintenance from her husband. Maintenance consist of food, clothing and lodging compatible with the social status of the parties. It should be a reasonable amount if fixed in monetary value.
 Maintenance.

Under Sections 488-490 Criminal Procedure Code Act V of 1898, a person may be compelled to make a monthly allowance

not exceeding fifty rupees for the maintenance of his wife his legitimate or illegitimate child whether minor or major who is unable to maintain itself.¹

1 Mahomed Haji v. Kalimadi 1918 41 Mad. 211. "Maintenance" means to find food, clothing and lodging. It does not include education, vide Naga Hla 11 Cr. L. J 40, Ma Shive 24 Cr. L. J. 1249. Kumli 25 Cr. L. J. 1249. But if there is an admitted agreement for living apart by mutual consent, there should be no order vide Rahim 42 P. R. 1888, Fazalunnissa 12 P. R. 1890. There must be proof of marriage according to the Personal Law where this fact is denied vide Abdur 5 Cal. 558. Din 5 All. 226.

An order for maintenance under Sec. 438 Criminal Procedure Code will cease in case of divorce on the expiration of 'iddat' vide in re Abdul Ali 1883 7 Bom 180. In the mother of the Muhammad 5 All. 223 (1882) Shah Abu v. Ulfat Bibi (1896) 19 All. 50.

CHAPTER V

1. LEGITIMACY.

Paternity and maternity are legal relations between the father and child and between the mother and child respectively.

The paternity of the child is established in the father, if the child is born at least six months after the celebration of a *sahih* valid, marriage, and in the case of a *fasid* marriage the period of six months is reckoned from after the consummation of marriage. The maternity of the child is always established in the mother whether lawfully married or not.

Under the Shia Law a child to be legitimate must be born six months after consummation of a *sahih* valid marriage.

According to the *sunni* law the natural period of gestation is from nine to ten months, and this is the rule of *Shia* Law.

2. *The Muslim Law of Legitimacy and section 112 of the Indian Evidence Act.*

The conflict between the principles of the status of legitimacy under the Muhammadan law and the provisions of section 112 of the Indian Evidence Act is well-known to all lawyers. The Allahabad High Court *In Sibti Muhammad v. Muhammad Hameed* 48 All., p, 625, (1926), held: "On a question whether a Muhammadan child born within six months of the marriage of his parents was to be considered legitimate, section 112 of the Indian Evidence Act 1872 applied and the child was legitimate." This decision is of importance, it is against the fundamental principles of the Muslim law as administered by the Courts in India. Section 112 adopts the period of birth as distinguished from the period of conception, as a deciding factor in determining legitimacy. In other words a child not conceived in lawful wedlock is legitimated by subsequent marriage. This is perhaps a

natural extension of the rule *legitimatio per subsequens matrimonium*.¹ However, in the Muslim theory of jurisprudence the question of legitimacy is to be determined with reference to the period of conception and not to the birth of the child. That is, the issue must be conceived in lawful wedlock to render it legitimate.

According to the Muslim law the following conditions are essential to establish legitimate descent:—

1. There must be a lawful marriage, that is *sahih* and not *batil* (void), and in the case of *fasid* marriage the issue is also considered legitimate.
2. The child must be born six months from the date of *sahih* marriage and in the case of *fasid* marriage the period of six months is to be reckoned from after consummation of marriage.

Section 112 of the Indian Evidence Act² lays down the law thus:—

It assumes the existence of a valid marriage and a child born during its continuance is therefore legitimate, e.g., a child born say one day after marriage is legitimate.

¹ Allahdad Khan's case, 10 All., p. 289 (on page 342): "No such rule is known to the Muhammadan law and we should really be introducing doctrines foreign to that system if influenced by the analogies furnished by the Roman, the French or the Scotch law of legitimation, we were to place acknowledgment of parentage under the Muhammadan law on the same footing as the rule of *legitimatio per subsequens matrimonium* rests on in the foreign systems of law."

² Section 112 is as follows: "The fact that any person was born during the continuance of a valid marriage between his mother and any man, or within two hundred and eighty days after its dissolution the mother remaining unmarried shall be conclusive proof that he is the legitimate son of that man unless it can be shown that the parties to the marriage had no access to each other at any time when he could have been begotten."

According to the Shiah law the child must be born six months from the date of consummation of marriage.¹

3. The natural period of gestation² is nine to ten months. This is the rule of Shiah law also.

4. Absolute non-access is a good ground for disclaiming paternity and further by the procedure of *li'an* the husband can also disclaim paternity of a child born to his wife.

It limits the period of gestation to 280 days after the dissolution of marriage so as to render the child legitimate.

It considers absolute non-access to each other as the only ground to establish illegitimacy

If we hold that section 112 supersedes the Muslim law, some interesting results follow. Section 112 contemplates marriage into two divisions that is valid or void, while the Muslim law subdivides

Section 112 and valid marriage.

1 What is the earliest viable age? Dr. Lyon (Medical Jurisprudence, p. 279) says: "(1) That there is no doubt but that a child born at or after the 210th day of uterine life may be reared; and (2) that the evidence afforded by recorded cases so strongly supports the view that children born as early as the 180th day may be reared, that the possibility of this cannot be denied. As regards the question of viability before the 180th day it should be noted that the validity of the evidence afforded by cases cited to prove early viability mainly depends on the accuracy with which the date of conception is determined." Dr. Outrepoint mentions a case in which a viable child was born 175 days after the last menstruation. The famous Jardine's case is the rearing of a 174-day child. The period of six months fixed by Muslim law is after all not ridiculous, though it should be noted that the Koran has not exactly fixed the earliest viable age, it is inferred from the above two passages of the Koran, viz., the period of 2 years and that of 80 months, on subtraction we get six months. Vide Koran Part XXI, Ch. XXXI, and XXVI, Ch. XLVI. According to the Fatawa-Kazi Khan the months are reckoned with reference to the moon, hence the period need not be full 180 days.

According to the Code Napoleon the shortest period is 180 days.

2 According to Imam Abu Hanifa the maximum period of gestation is 2 years; this is with a view to cover abnormal cases. The Maliki jurists had fixed 4 years but in Algeria Kazis administering Maliki law have adopted ten months. Vide Ameer Ali's Muhammadan Law, vol. II, p. 224. D'Ohsson, Tableaux Gen. de l'Empire Othoman, Vol. III, pp. 102-3.

The Code Napoleon, Art. 312, has fixed 300 days.

marriages into three categories, *i.e.*, *sahih* (valid), *fasid* (irregular) and *batil* (void). It follows thus that the fine distinction maintained in the Hanafi system between *Sahih*, *fasid* and *batil* marriages must cease to exist, and they must be made to fit into two categories either valid or void. Our difficulty is further augmented when we come to realise that there is no definition of valid marriage given in the Evidence Act.

However it will be granted that in every case the test of validity of marriage will be determined in accordance with the personal law of the parties ; that is, in the case of the Muslims their personal law would be applicable. For instance, no Court of law would hold a marriage of a person with his own sister as valid in spite of the ceremony of marriage, for it is within the prohibited degree. A married woman that gave birth to a fully developed child, say within a month from the date of her marriage, was pregnant long previous to her marriage. According to section 112 such a child is considered legitimate, but for section 112 to apply the marriage must be a valid marriage. Hence the question simply resolves itself into a simple proposition whether marriage with a pregnant woman is lawful under the Muslim law? According to the Muslim law it is unlawful to marry a pregnant woman when the author of the pregnancy is known ; in other words, when it is known by whom the woman has been rendered *enceinte*, nobody is to marry her until delivery.

Thus we see that for section 112 to apply, the validity of marriage would be determined according to the Muslim law, and in the majority of these cases marriages in which children were born within the period of six months from the date of marriage of their parents, would be instances of invalid marriages. That is, the woman in those cases was not at the time of marriage a fit subject for *nikah*.

Of the writers on Anglo-Muhammadian law, Ameer Ali holds the opinion that section 112 cannot be held to supersede the Muslim law.¹ Sir Roland Wilson is of the same opinion ; he

¹ Ameer Ali, *Muhammadian Law*, Vol. II, p. 234 : " Section 112 of the Indian Evidence Act embodies the English rule of law and cannot be held to carry or supersede by implication the rules of Muhammadian law the Muslim law does not recognise the doctrine of *legitimatio per subsequens matrimonium*."

says, "The rule of the Indian Evidence Act, section 112 . . . is notwithstanding its place in the statute book a rule of substantive marriage law rather than of evidence, and as such has no application to Muhammadans so far as it conflicts with the Muhammadan rule that a child born within six months after the marriage of its parents is not legitimate."¹ Mr. D. F. Mulla however holds the contrary view² Mr. F. B. Tyabji is not definite on this point.

Section 1 of the Indian Evidence Act says that, "It extends to the whole of British India and applies to all judicial proceedings in or before any Court." This passage itself suggests that its provisions were not intended to supersede any substantive rule of law except those governing judicial proceedings. The Muslim law of legitimacy is an integral part of the Muslim law of marriage and inheritance. This was the view expressed by the three judges in Muhammad Allahdad's case 10 All., 289 (1888), and discussing the Muslim law of acknowledgment of parentage Mr. Justice Straight held : "Now I do not hesitate to say having very carefully considered the language of their Lordships' judgment that they unhesitatingly adopt the view that the rules of Muhammadan law relating to acknowledgment by a Muhammadan of another as his son or daughter as the case may be are rules of substantive law. . . ."³

And in the same case on page 339 Mr. Justice Mahmud referred thus to section 112. "It may some day be a question of great difficulty to determine how far the provisions of that section are to be taken as trenching upon the Muhammadan law of marriage, parentage, legitimacy, and inheritance, which department of law under other statutory provisions are to be adopted as the rule of decision by the Courts in British India. Fortunately the difficulty does not arise in this case." We all know that those statutory provisions, which make it incumbent on the Courts in

¹ Anglo-Muhammadan Law, p. 161.

² Muhammadan Law, p. 135.

³ 10 All, 289.

British India to administer the Muslim law, are posterior in date to the Indian Evidence Act, hence in the case of direct conflict the Muhammadan law should be upheld. It is a well established presumption that subsequent enactment do not override prior ones, unless they profess to abrogate the previous provisions.

There is a case reported in the Indian Cases, Vol. 43, p. 883 (1917), decided by Mr. Stanyon, Judicial Commissioner, Nagpur, in which the learned Judge held the correct view that "Neither paternity nor legitimacy can be obtained by adoption and a child begotten by *zina* cannot be made legitimate by subsequent marriage of its parents before its birth, section 112 of the Indian Evidence Act being inapplicable to Muhammadans."

So far I have not discussed what would be the effect of s. 112 on the *fasid* marriages of the Muslim law. We have noticed that as regards *sahih* marriages the rule of six months is to apply after the date of marriage, but in the case of *fasid* marriages, this rule is to apply after actual cohabitation. The rule operates more strictly in the case of *fasid* marriages. In the case of a *fasid* marriage *iddat* and dower become obligatory only after cohabitation (prior to that it is treated as devoid of legal consequences), and the issue of the union subject to the six months' rule is considered legitimate.

Now if section 112 were to apply to *fasid* marriages also, then the well-recognised distinctions between *sahih* and *fasid* marriages would automatically cease to exist. This point also came before the Court for the first time in a case in 1926 and happily the judges of the Chief Court, Lucknow, have decided it correctly (*Musammatt Kaniza v. Hasan Ahmad*, The Indian Law Reports, Lucknow Series (1926), Vol. I, p. 71). The Court held that "Section 112 of the Evidence Act cannot be applicable in any way to the marriage which is neither void *ab initio*, *batil* nor absolutely void but is *fasid*, i.e., irregular, inasmuch as section 112 is based on a division of marriage into two categories (valid and invalid) and cannot be applicable to Muhammadan Law which divides marriages into three categories, , void *ab initio* (*batil*), *fasid*, and valid. In any case if

section 112 can be held applicable, then the word 'valid' in that section should be construed as 'flawless' so that the presumption would not apply to *fasid* marriages."

Consequently my conclusion is that section 112 of the Evidence Act should not be held to apply to *sahih* and *fasid* marriages contracted under the Sunni Law.

Let us proceed to examine the effect of holding that section 112 supersedes the Shia' law of legitimacy. The Shia' jurists

divide valid marriages into two categories:
 Section and the Shia' (1) permanent marriages, (2) temporary marriages *muta'*. We know that a *muta'* marriage is radically different from permanent marriages, for *muta'* is contracted for a fixed time or period, e.g., for a day, month, or for several years. While a Muslim cannot marry more than four by permanent marriages, there is no limit fixed as regards *muta'* marriages. The *muta'* wife does not inherit at all. There is no divorce in the *muta'* form of marriage.¹ The children are legitimate as in the case of permanent union. If section 112 is considered applicable to the *muta'* marriages, then the distinction between permanent and temporary marriages ceases to exist in the Shia' law. If not, then it follows that the Muslim law will apply to *muta'* marriages and section 112 only to permanent marriages. Thus there would be two different rules instead of the Muhammadan law of paternity.

In short it cannot be maintained that section 112 applies either to the Sunni law or to the Shiah law.²

So far we have analysed the application of the six months' rule with reference to section 112 of the Evidence Act; we proceed now to discuss the bearing of the other provisions of section 112 on the general Muslim law. Section 112 limits for conclusive presumption the period of gestation to 280 days after the dissolution of

¹ But the marriage could be dissolved by the doctrine of the gift of the term.

² What about this peculiar case of the Shiah law cited by Mr. Shama Charan Sircar, Tagore Law Lectures, 1874, p. 274: "If a man should erroneously cohabit with a woman who is a stranger) supposing the woman to be his wife or his slave and she should produce a child, its parentage is established in him." How is the case to be determined by section 112 of the Indian Evidence Act?

marriage to render the child legitimate. Now assume the child is born after 285 days, then under the Evidence Act it is a question of fact for the Court to determine whether it is illegitimate according to section 112 ; but according to the Muslim law of legitimacy such a child is undoubtedly legitimate. Because the Shia' jurists and majority of the Sunni jurists hold the maximum period to be ten months. It is not so easy to decide how long human gestation may be prolonged. Guy observes that of 14 authentic cases the minimum duration was 270 days, the maximum 294 and the average 284 days. According to Wharton and Stille, in 19 cases the duration was 280 days. Dr. Lyon discussing the longest period of gestation points out that "it may be regarded as proved that this may be 296 days." Most authorities agree in considering that the interval may be as long as 44 weeks or 308 days. Some authorities consider that the interval may extend to the forty-sixth week, 315 to 322 days.¹ The Code Napoleon has fixed 300 days.

Consequently even the natural maximum limit fixed by the Shiah jurists that of ten months and accepted by many of the Sunni jurists cannot be said to be conclusive, and the Hanafi jurists in such abnormal cases fall back on the dictum of Imam Abu Hanifa that the birth must take place within 2 years after dissolution or divorce of the woman. However, from this we cannot argue that the great Imam has fixed 2 years as the longest period of gestation, because this rule is to be read together with the provision that while observing the period of *iddat*, the woman must declare that she is pregnant. This fact is to be decided within the period of *iddat*. And if after declaration the woman were to continue *enceinte* and exceed the natural maximum limit of gestation, the case would then be fully covered by the two years' rule of Imam Abu Hanifa.

The rule of non-access is recognised by the Indian Evidence Act. It is also recognised by the Muslim Law. Section 112 does

¹ Medical Jurisprudence, p. 277. See also Taylor's Medical Jurisprudence, p. 60.

not in terms refer to the presumption being rebutted if the husband is impotent. However access means sexual intercourse and it is negatived by the fact that the husband is impotent.

The rule of non-access, of Section 112 and the Muslim Law.

Finally if section 112 is held to supersede the Muslim law, then the procedure of *li'an* must cease to exist, the effect of *li'an* is that the paternity of the child born to the wife is not established. ¹ it is a peculiarity of the Muslim law that it permits the husband to disclaim a child born from a wife lawfully married.

e. g., A is married to B. Later on B. within A's knowledge committed adultery and issue is born to them.

The child's paternity is established in A ; but he can disclaim it by *li'an*.

As a matter of fact legitimacy as understood by the Muslim jurists stands on a different footing to the conception of legitimacy under the English law or to that in section 112 of the Indian Evidence Act. According to the English law legitimacy attaches to the child, it fixes its relationship with both its parents. Whereas the Muslim law speaks of the relationship and of two distinct relationships, *viz.*, paternity and maternity. Under the Sunni *Hanafi* Law there is no such thing as an absolute illegitimate child, that is, a child is always legitimate to its mother. In other words, the so-called illegitimate child always inherits from the mother.

The idea of legitimacy.

According to the English law the child of an unmarried woman is always a bastard, but under the Muslim law maternity cannot be disclaimed, whereas paternity admits of the possibility of being disclaimed. When the father has disclaimed a child, it does not affect its right of inheriting from its mother. This novel conception finds no place in the laws of marriage of any other legal system.

The Muslim law insists on the purity of conception—a child must be conceived in lawful wedlock. All *bona fide* cases of error of doubt, that is, all marriages contracted in ignorance of the fact that the woman was prohibited are instances of *fasid*

marriages and the issue is accordingly legitimate, hence it can be said that to this extent the Muslim law disfavours bastardizing of children. But it goes no further. A child if it is the result of fornication, adultery, incest, or of any description of illicit union is held illegitimate to his natural father but legitimate to his natural mother.

Finally, if section 112 is held to supersede the Muslim law of legitimacy, then it will affect not only the relationship of the child with his father but with other members of the family also. After all it may be granted that a natural father should support his issue irrespective of the fact that it is illegitimate or legitimate, but why should other members of the family be forced to admit a stranger socially condemned as their prospective heir, for the Muslim law of inheritance admits of minute division of property into shares, and the sharers again have reciprocal rights of inheritance *inter se* under certain contingencies well known to lawyers.

§ 3. *The Muslim Law of Acknowledgment.*

Iqrar the law of acknowledgment was at first misunderstood and wrongly applied by the Courts and it has recently by the later decisions been brought in conformity with the Muslim Law. A man may acknowledge another his child subject to the following conditions.

1. The acknowledgee must be of such an age to admit the possibility of the relation of father and child to one another. That is there must be a reasonable difference in age to establish paternity.

2. The acknowledgee must be of an unknown descent, that is a man cannot acknowledge a child whose birth is known, and whose paternity is thereby already established.

3. The acknowledgee, if he is of sufficient age to understand the transaction must consent to the fact of acknowledgment.

4. An acknowledgment lawfully effected cannot subsequently be revoked.

It is not permissible to acknowledge a *walad-us-zina*, child born of illicit connection whether incest, fornication, whoredom or

adultery or a child whose mother's marriage as alleged has been disproved. An illegitimate child cannot be made legitimate by the fact of acknowledgment or subsequent marriage. Acknowledgment is merely a declaration of legitimacy, and it is distinct from legitimation *per subsequens matrimonium* as found in other systems of Jurisprudence. Some of the old decisions of the Courts are based on the rule legitimation *per subsequens matrimonium* which is contrary to the Muslim Law, and it has been held that a child born out of wedlock if acknowledged acquires legitimacy, *vide Bibi Nujeeboonissa v. Bibi Zameerun* (1869) 11 W. R. 426 ; that acknowledgment is sufficient even if there be no evidence of lawful 'nikah', *Bibi Wuheedun v. Syed Wusee Hossein* (1871) 15 W. R. 403. The Privy Council erroneously has repeatedly held that an illegitimate child could be acknowledged and thus acquire the status of legitimacy. *Ashrufood Dowalah v. Hyder Hossein* 11 Moo. I. A. 94. *Nawab M. Azmat Ali v. Musammnat Ladli Begum* (1881) 9 I. A. 8 ; 8 Cal. 422. *Abdool Razak v. Aga Mahomed* (1894) 21 I. A. 56 ; 21 Cal. 666. In *Sadakat Hossein v. Syed Mahomed Yusoof* 11 I. A. 31 (1883) ; 10 Cal. 663, the Privy Council hesitated to express the old view.

However the correct Muslim Law has been laid down in *Muhammad Allahabad Khan v. Mahomed Ismail Khan* (1888) 10 All. 289, and this view was practically accepted by the Privy Council in *Sadik Husain Khan v. Hashim Ali Khan* (1916) 43 I. A. 212 and finally in *Syed Habibur Rahman v. Syed Altaf Ali*, 19 A. L. J. R. 414 (1921), the Privy Council observed, "Legitimacy is a status which results from certain facts. Legitimation is a proceeding which creates a status which did not exist before. In the proper sense there is no legitimation under the Mohammadan Law, examples of it may be found in other systems. The adoption of the Roman and the Hindu Law effected legitimacy. The same was done under the Canon Law and the Scotch Law in respect of what is known as legitimation *per subsequens matrimonium*. By the Mohammadan Law a son to be legitimate must be the offspring of a man and his wife.....any other offspring is the offspring of *zina* that is illicit connection and cannot be legitimate. The term wife necessarily connotes marriage ; but as marriage may be consti-

tuted without any ceremonial, the existence of marriage in any particular case may be an open question. Direct proof may be available, but if there be no such proof indirect proof may suffice. Now one of the ways of indirect proof is by an acknowledgment of legitimacy in favour of a son.....It must not be impossible upon the face of it, *i.e.* it must not be made when the ages are such that it is impossible in nature for the acknowledgor to be the father of the acknowledgee, or when the mother spoken to in an acknowledgment, being the wife of another, or within prohibited degrees of the acknowledgor, it would be apparent that the issue would be the issue of adultery or incest. The acknowledgment may be repudiated by the acknowledgee. But if none of these objections occur then the acknowledgment has more than a mere evidential value. It raises a presumption of marriage, a presumption which may be taken advantage of either by a wife claimant or a son claimant. Being however a presumption of fact and not *juris et de jure* it is, like every presumption of fact capable of being set aside by contrary proof.....' This view has been reaffirmed by the Privy Council in *Mohabbat Ali Khan v. Muhammad Ibrahim Khan* (1929) A. L. J. R. 465.

The evidential value of acknowledgment is that it raises a presumption of valid marriage, and if not set aside by contrary proof, the marriage will be held proved, and legitimacy would thereby be established, and the claimant would be absolutely entitled to claim his share in the inheritance.

The presumption from acknowledgment only operates when direct proof of *nikah* is not available at all, this presumption can be rebutted by proof that the marriage was under the circumstances void.¹

¹ In *Liaquat Ali v. Karimunnissa* 15 All. 396 (1896) it was ascertained that the mother of the acknowledgee was the undivorced wife of another person at the time she married the acknowledgor. Held following *Muhammad Allahdad's* case 10 All. 289 that the defect could not be remedied by the acknowledgment of legitimacy. The same Law was adopted in *Dhan Bibi v. Lalon Bibi* 27 Cal 801 (1900) which is a case of the child being the result of fornication—*walad-uz-zina*. This view was followed by the Bombay High Court in *Mardan Sahib* 34 Bom. 111 (1909)

In *Mohammad Shafiqullah v. Nuhulla* 88 I. C. 954 (All. 1925) it was ascertained that the Hindu woman married was the wife of another at time of marriage and hence the '*nikah*' was void '*ab initio*.'

In *Khajah Hedayat v. Rai Jan* 3 Moo. 1.A. 295 (1844) it was proved that cohabitation with a woman was a continual one as man and wife and having that repute and a child born was treated as legitimate. These facts are sufficient to raise a presumption of marriage and acknowledgment.

CHAPTER VI

GUARDIANSHIP

According to the Muslim Law the lawful guardian is a person having the care of a minor and his property and empowered to contract the minor in marriage.

There are three kinds of guardianships.

(a) Guardianship for contracting marriage on behalf of a minor or an adult insane person.

(b) Guardianship of the person of a minor.

(c) Guardianship of the property of the minor.

Anglo-Muslim Law has to some extent affected the law of guardianship for contracting marriage and has materially affected guardianship of the property of the minor.

The Indian Majority Act IX, 1875, does not apply to matters relating to marriage dower and divorce, but as regards other matters guardianship of person and property Muslims will apparently be governed by the Majority Act, thus in case of wills, gifts, *waqfs*, etc. minority will terminate on completion of the eighteenth year, and in case of a minor who is under the Court of Wards the age of majority will terminate on his completion of twentyone years of age. It is also twentyone for a minor whose guardian has been appointed by order of any Court in British India.

§ 1. *Jabr—Guardianship for Marriage.*

The guardian must be an adult and sane person. The guardians who can lawfully contract the marriage of minors are those who are residuaries in their own right and the nearer in degree excludes the more remote.

(i) The following is the fixed order of the guardians who can contract marriage on behalf of the minor (1) The father¹ (2) in

¹ In *Shahul v. Allah Bachayo* (Sindh 1915) 34. I. C. 504. The Court held the father who was profligate, and had abused his right was unfit to act as the guardian for his minor daughter aged 10 years.

the absence of the father the father's father how high soever, (3) failing these and subject to the option of repudiation it falls upon the full brother, (4) then on the half brother on the father's side, and then on other relations etc.*

(ii) An insane person cannot personally contract marriage, but a marriage may be contracted on behalf of a lunatic by his or her lawful guardian.

(iii) In the absence of residuaries in their own right, the right of guardianship devolves thus : First of all the mother is entitled to contract marriage on behalf of her minor child of either sex, (2) thereafter failing her the paternal grandmother, (3) the maternal grandfather, and then other relations.*

A testamentary guardian has no right to contract a minor in marriage, unless his right arises by virtue of relationship, or he is authorised by the *Kazi* or is himself the *Kazi* duly empowered. Under Anglo-Muslim law where the minor is under a District Court or a Court of Wards, it seems the guardian for marriage is competent to make a choice, subject to the Court's sanction, vide *Monijan Bibi v. District Judge Birbhum* (1914) 42 Cal. 351.

Under Anglo-Muhammadian Law, it seems, that the mother or the grandmother may in special circumstances lawfully contract marriage, on behalf of a minor, and it will not be annulled unless proved to be unsuitable and if the father has become an apostate¹ he loses his right of guardianship for marriage for his minor children, and it seems that the mother in such circumstances, may contract marriage for a minor child without his (the father's)

*For a full list vide Anglo-Muslim Law by the present author p. 57.

¹ But the Act XXI of 1850 provides that no law shall inflict on an apostate from it any "forfeiture of rights or property" and in *Muchoo v. Arzoon* 5 W. R. 285 (1866), the Calcutta High Court held that a Hindu father is not deprived of the custody of his children on account of his conversion to Christianity. Again in *Shamsing v. Santabai* (1901) 25 Bom 551, it was held that a Hindu convert to Islam is not disqualified from giving in adoption his son to a Hindu, and in *Gul Muhammad v. Must. Wazir Begum* 36 Punjab Rec. 191 (1901) a convert from Islam to Christianity successfully competed for the guardianship of property of his own son and daughter. But it should be noted that none of those cases are on the question of guardianship for marriage.

consent. In *Kaloo v. Gureebolah* (1868). 10 W. R. 12 the Court refused to dissolve the marriage contracted by the mother without the consent of the nearest paternal relation, who was at that time in Jail. *In the matter of Mohin Bibi* (1874) 13 B. L. 160 where the father having apostatised from Islam, the mother contracted her minor daughter's marriage, and it was pointed out that a Muslim apostate to Judaism was disqualified from contracting marriage for his minor daughter.

A minor boy or girl, who has been married by their lawful guardians, who have made provisions for their benefits, is entitled to claim fulfilment of any of the terms of the agreement as regards *Kharch-i-pandan*, etc. In *Khwaja Mahomed Khan v. Husaini Begum* 37, I. A. 152, 32 All. 410. The Privy Council held *Kharch-i-pandan* (betel box expenses) is a personal allowance to a wife fixed before or after marriage.....On Oct. 25th, 1877, the appellant executed an agreement with the respondent's father that in consideration of the respondent's marriage with his son (both being minors at the time), he would pay to the respondent Rs. 500 a month in perpetuity for her betel leaf expenses.....held that the respondent, although no party to the agreement was clearly entitled to proceed in equity to enforce her claim."

Under Anglo-Muhammadian Law a minor on attaining puberty may choose his or her own husband, and thereby may commit breach of a betrothal arranged by the lawful guardian. In *Imam Din v. Kamal* 29 I. C. 750, it was held that in such circumstances the guardian is not liable for damages, but in *Ghulam Mahomed v. Mehraj Din* 1923 Lah. 679 it was held that compensation under S. 73 of the Contract Act for any loss caused to the aggrieved party by the breach thereof may be granted. However in *Abdul Razak v. Mahomed Hussain* 42 Bom. 499 it was held that no suit lies to recover damages for breach of mere promise of marriage.

The father of the minor does not become surety by the fact of the marriage having been arranged by him unless he himself guarantees payment of the dower *vide M. Siddiq v. Shahabuddin* 49 All. 557 (1927), 25 A. L. J. R. 466.

All these cases have effected obviously an extension of Muslim law by the process of judicial interpretation of the law.

§ 3. *Guardianship of the property of a minor.*

The lawful guardians of a minor's property are the following:¹

1. The father of the minor.
2. The *wasi*, executor, appointed by the father's will, even though the executor were no relation, and after him the guardian appointed by the latter.
3. In the absence of an executor duly appointed the right devolves on the grandfather in the first instance, and after him on the guardian appointed by him, and after him on the guardian appointed by the designated guardian.
4. And finally failing all these it is for the *Kazi* (Court) to appoint a guardian one or more.

Anglo-Muhammadan Law makes a distinction between legal *de jure* guardian and *de facto* guardian.² A *de facto* guardian is a person who has charge of the person of the minor, and as such

¹ Imambandi v. Mutsaddi 45 I. A. 73 (1918) may be cited as the leading case on the Law of guardianship, and in this case late Mr. Ameer Ali has ably expounded the law.

² The decisions of the Courts are conflicting, on the point whether a sale of the property of minors by a legal guardian of their person, and de facto manager of their properties to pay off ancestral debts in good faith is valid or not. For the affirmative vide Hasan Ali v. Mehdi Husain (1887) 1 All 533, Majidan v Ram Narain 26 (1903) Mafazzal Hossein v, Basid Sheikh 34 Cal. 36. The Madras High Court has expressly dissented from Hasan Ali's case 1 All 533 vide Abeul Majeeth v. Krishnamachasiar (1915) 24 Mad. 243. And in Abdul Haq v. Muhammad Yahya (Pat 1923) 78 I. C. 483 the Court held that a de facto guardian has no power to enter into a contract for the sale of property, and according to the Calcutta High Court the minor cannot be bound by his guardian's statement Basarat Sarkar v. Him Pramik 65 I. C. 353. (Cal. 1921), and in Mata Din v. Ahmed Ali 39 I.A. 49 before the Privy Council an infant on attaining majority successfully challenged a sale by his elder brother. A sale by the mother for the benefit and advantage of the minor was held to be valid Sheikh Rajab Ali v. Wazir Aii 1 Pat. L. J. 188 (1916) and for necessity it seems that the mother could lawfully mortgage the property vide Abid Ali v. Iman Ali. 38 All. 92 (1915). But under the Muslim Law all such acts effected by the mother are invalid, unless she is the executrix of the father, or authorised by the minor's legal guardian or by the Kazi, Court. This is also the view taken by the Privy Council in Imambandi v. Mutsaddi 45. In. Ap. 73 (1918). It disapproved of Ayderman v. Syed Ali 37. Mad. 514. The mother cannot enter into arbitration to make the award binding on the minors as to their shares vide M. Ejas Husain v. M. Iftehhar 1932 A.L.J.R. 199.

cannot validly discharge the functions of a legal guardian, he has no power to transfer any right or interest in the immoveable property of the minor, but in special circumstances to meet some emergencies¹ he is entitled to incur debts on the pledge of the minor's goods and chattels only.

The general Law of British India respecting guardianship is contained in the Guardians and Wards Act VIII of 1890. Sir Courtenay Ilbert who originally introduced the Guardians and Wards Act in the Legislative Council in 1886 observed as follows : "Nothing can be further from my intention than to interfere with native customs, or usages, or to force Hindu or Muhammadan Family Law into unnatural conformity with English Law... ..It is not intended by this measure to make any alteration in Hindu or Muhammadan Family Law." The Act is of a permissive character giving guardians an opportunity to place themselves under the control of the Court.

The following are some of the important sections equally applicable under Anglo-Muslim Law.

When the Court is satisfied that it is for the welfare of a minor that an order should be made

- (a) appointing a guardian of his person or property or both, or,
- (b) declaring a person to be such a guardian,
the Court may make an order accordingly.²

In appointing or declaring the guardian of a minor the Court shall, subject to the provisions of this section, be guided by what consistently with the law to which the minor is subject,³ appears, in the circumstances, to be for the welfare of the minor.

¹ e.g. for food clothing alimemt and nursing.

² Section 7.

³ That is the Muslim Law in case of a Muslim minor ; but there are some cases which are not free from doubt. In the matter of Saithri 16 Bom. 307 (1891) a girl of fifteen educated in a Christian Missionary School was claimed under Sec. 419 Criminal Procedure Code by a Hindu mother, her petition was dismissed, and the girl allowed to go wherever she liked. In the matter of Joshy Assam 28 Cal. 290 (1895) where the child was brought up as a Christian the Court refused the applica-

(i) A guardian appointed or declared by the Court shall be entitled to such allowance, if any, as the Court thinks fit, for his care and pains in the execution of his duties.¹

(ii) A guardian of the person of a ward is charged with the custody of the ward, and must look to his support, health and such other matters as the law to which the ward is subject requires.²

(iii) A guardian of the property of a ward is bound to deal therewith as carefully as man of ordinary prudence would deal with it if it were his own, and, subject to the provisions of this chapter he may do all acts which are reasonable and proper for the realisation, protection, or benefit of the property.³

(iv) When a person other than a Collector, or than a guardian appointed by will or other instrument, has been appointed or declared by the Court to be guardian of the property of a ward, he shall not without the previous permission of the Court,

(a) mortgage or charge, or transfer by sale, gift, exchange, or otherwise, any part of the immoveable property of his ward or

(b) lease any part of that property for a term exceeding five years, or for any term extending more than one year beyond the date on which the ward will cease to be a minor.⁴

(v) A disposal of immoveable property by a guardian in contravention of either of the two last foregoing sections is voidable at the instance of any other person affected thereby.⁵

tion of father on the ground that he had deliberately previously resigned parental authority. In *Maknoond Lal Singh v. Nabadwip Chunder* 25 Cal. 881 (1808) the father had become a Christian and left his son in charge of his Hindu relatives. Later he claimed the son restored to him, application was refused. *Gul Muhammad v. Must. Wazir Begum* Punj. Rec. 1901 where the father accepting Christianity had his children also baptised.

1 Section 22.

2 Section 24.

3 Section 27.

4 Section 29.

5 Section 30

Re A guardian selling land to avoid litigation vide *Kali Dutt Jha v. Abdul Ali* 16 Cal. 627 (1888). As to mortgage vide *Hurbai v. Hiraji Byramji* 20 Bom. 116 (1895). As to specific performance of the contract, minor on attaining majority cannot demand it vide *Mir Sarwarjang v. Fakhruddin* 39 I. A. 1 (1911).

CHAPTER VII

SUCCESSION

§ 1. *Wasiyat-Will*

Wasiyat-Will, means a testament, an assignment of property to take effect after the death of the testator.¹ In British India a Muslim may have his will registered. A written will may also be deposited in a sealed cover with the Registrar to be opened after the death of the testator. A will may be admitted to probate if so the powers and duties of the executor will be determined by the Indian Succession Act XXXIX of 1925. It is submitted that with or without probate a *wasi*, will be deemed to be an executor within the meaning of parts VIII and IX of the Indian Succession Act 1925. Under the Muslim Law a Muslim can only dispose of one-third of his property by will therefore the executor is in the position of a trustee for the heirs to the extent of two thirds, and he is an active trustee as to one-third of the net assets for purposes of the Will²

While the substantive Law applicable to Muslim is their own personal law, the procedure is regulated by the general law of British India. Any person interested in the estate of a deceased Muslim may bring a suit for its administration by the Court.³ The

1 A Muslim will may be admitted in evidence after due proof even if now probate has been obtained, Shaik Moosa v. Shaik Essa (1884) 8 Bom. 241. Saikina Bebi v. Mohammad Ishaq. 37 Cal. 839 (1910) Mahomed Yusuf v. Har Govandas 47 Bom. 231 (1923), [The executor may sell the property without taking probate].

2 Vide Mirza Kurratulain v. Nawab Nazhat-ud-dowla 33 Cal. 116 (1903) 32 I. A. 244.

Eusufalli v. Abdeali 45 Bom 75 (1921) 59. I. C. 396.

3 The taking out of probate of letters of administration is not obligatory for the Muslims, vide Shaik Moosa v. Shaik Essa 8 Bom. 241 (1884), vide also Sir Mahomed Yusuf v. Hargovandas 47 Bom. 231. (1923).

administration of a Muslim estate in British India is effected under the Indian Succession Act XXXIX of 1925. (I. S. A.)¹

§ 2. *The Law of Succession in British India.*

Of Executors and Administrators.

I. S. A. s. 2.

“Executor” means a person to whom the execution of the last will of a deceased person is by the testator’s appointment confided.

“Administrator,” means a person appointed by competent authority to administer the estate of a deceased person when there is no executor.

The administrator on appointment by a District Judge is granted letters of administration.²

I. S. A. s. 218.

(1) If the deceased has died intestate and was a.....Muham-madan.....administration of his estate may be granted to any person who, according to the rules for distribution of the estate applicable in the case of such deceased, would be entitled to the whole or any part of such deceased’s estate.

(2) When several such persons apply for such administration, it shall be in the discretion of the Court to grant it to any one or more of them.

(3) When no such person applies, it may be granted to a creditor of the deceased.

I. S. A. s. 216.

After any grant of probate or letters of administration, no other than the person to whom the same may have been granted shall have power to sue or prosecute any suit, or otherwise act as

1 This act is merely a consolidating Act amalgamating the Indian Succession Act X of 1865 and the Probate and Administration Act V of 1881 and some other Act. The following Acts are also applicable to a limited extent.

(1) The Bombay Regulation Act VIII of 1827.

(2) The Administrator General and Official Trustees Act V of 1902.

(3) The Administrator Generals Act III of 1913 as amended by Act X of 1914.

2 The Court fee leviable on letters of administration is on a graduated scale fixed by each Province under the Court Fees Act 1870, under the Devolution Act XXXVIII of

representative of the deceased, throughout the province in which the same may have been granted until such probate or letters of administration has or have been recalled or revoked.

I. S. A. s. 211.

The executor or administrator, as the case may be, of a deceased person is his legal representative for all purposes and all the property of the deceased vests in him as such.

When the deceased was aMuhammadan..... nothing herein contained shall vest in an executor or administrator any property of the deceased person which would otherwise have passed by survivorship to some other person.

I. S. A. 223 I. S. A. s. 236.

Probate.....Letters of administration cannot be granted any person who is a minor or is of unsound mind, nor unless the deceased was a.....Muhammadan.....to a married woman without the previous consent of her husband.

Application of the assets.—

The following rules have superseded the Hanafi Law. The Muslim Law gives priority to funeral expenses but treats death-bed charges, etc., like any other debts,

I. S. A. s. 319.

The executor or administrator shall collect, with reasonable diligence, the property of the deceased, and the debts that were due to him at the time of his death.

I. S. A. s. 320.

Funeral expenses to a reasonable amount, according to the degree and quality of the deceased, and death-bed charges including fees for medical attendance, and board and lodging for one month previous to his death, shall be paid before all debts.

I. S. A. s. 321.

The expenses of obtaining probate or letters of administration, including the costs incurred for or in respect of any judicial proceedings that may be necessary for administering the estate, shall be paid next after the funeral expenses and death-bed charges.

I. S. A. s. 322.

Wages due for services rendered to the deceased within three months next preceding his death by any labourer, artizan or

domestic servant shall next be paid, and then the other debts of the deceased according to their respective priorities (if any).

I. S. A. s. 323.

Save as aforesaid, no creditor shall have a right of priority over another; but the executor or administrator shall pay all such debts as he knows of, including his own, equally and rateably, as far as the assets of the deceased will extend.

I. S. A. s. 325.

Debts of every description must be paid before any legacy.

Power of transfer restricted.

I. S. A. s. 310.

If any executor or administrator purchases, either directly or indirectly, any part of the property of the deceased, the sale is voidable at the instance of any other person interested in the property sold.

I. S. A. s. 307.

(1) Subject to the provision of sub-section (2) an executor or administrator has power to dispose of the property of the deceased vested in him under section 211, either wholly or in part, in such manner as he may think fit.¹

(2) If the deceased was a.....Muhammadian.....the general power conferred by sub-section (1) shall be subject to the following restrictions and conditions, namely:—

(i) The power of an executor to dispose of immoveable property so vested in him is subject to any restriction which may be imposed in this behalf by the will appointing him, unless probate has been granted to him and the Court which granted the probate permits him by an order in writing, notwithstanding the restriction to dispose of any immoveable property specified in the order in a manner permitted by the order.

(ii) an administrator may not, without the previous permission of the Court by which the letters of administration were granted—

¹ Illustrations to Section 307.

(i) The deceased has made a specific bequest of part of his property. The executor, not having assented to the bequest, sells the subject of it. The sale is valid.

(ii) The executor in the exercise of his discretion mortgages a part of the immoveable estate of the deceased the mortgage is valid.

(a) mortgage, charge or transfer by sale, gift, exchange or otherwise any immoveable property for the time being vested in him under section 211, or

(b) lease any such property for a term exceeding five years.

(iii) A disposal of property by an executor or administrator in contravention of clause (i) or clause (ii) as the case may be, is voidable at the instance of any other person interested in the property.

Liability of an executor or administrator.—

I. S. A. s. 368.

When an executor or administrator misapplies the estate of the deceased, or subjects it to a loss or damage, he is liable to make good the loss or damage so occasioned.¹

I. S. A. s. 369.

When an executor or administrator occasions a loss to the estate by neglecting to get in any part of the property of the deceased, he is liable to make good the amount.²

More than one executors or Administrators.—

I. S. A. s. 311.

When there are several executors or administrators, the powers of all may, in the absence of any direction to the contrary, be exercised by any one of them who has proved the will or taken out administration.³

I. S. A. s. 312.

Upon the death of one or more of several executors or administrators, in the absence of any direction to the contrary in the

¹ Illustrations to section 368.

(i) The executor pays out of the estate an unfounded claim. He is liable to make good the loss.

(ii) The deceased had a valuable lease renewable by notice. which the executor neglects to give at the proper time. The executor is liable to make good the loss.

² Illustration to section 369.

The executor neglects to sue for a debt till the debtor is able to plead that the claim is barred by limitation and the debt is thereby lost to the estate. The executor is liable to make good the amount.

³ Illustrations to section 311.

(i) One of several executors has power to release a debt due to the deceased.

will or grant of letters of administration, all the powers of the office become vested in the survivors or survivor.

Powers of an Executor or administrator.—

I. S. A. s. 305.

An executor or administrator has the same power to sue in respect of all causes of action that survive the deceased, and may exercise the same power for the recovery of debts as the deceased had when living.

I. S. A. s. 306.

All demands whatsoever and all rights to prosecute or defend any action or special proceeding existing in favour of or against a person at the time of his decease, survive to and against his executors or administrators¹ except causes of action for defamation, assault as defined in the Indian Penal Code, or other personal injuries not causing the death of the party; and except also cases where, after the death of the party, the relief sought could not be enjoyed or granting it would be nugatory.²

Revocation of grants.—

I. S. A. s. 263.

The grant of probate or letters of administration may be revoked or annulled for just cause.³

*Explanation—*Just cause shall be deemed to exist where—

(a) the proceedings to obtain the grant were defective in substance ; or

(ii) One has power to surrender a lease.

(iii) One has power to assent to a legacy.

1 A creditor of the deceased therefore can institute a suit against the executor or administrator as the case may be.

2 Illustrations to section 306

A sues for divorce. A dies. The cause of action does not survive to his representative.

3 Illustrations to section 263.

(i) The Court by which the grant was made had no jurisdiction.

(ii) The will of which probate was obtained was forged or revoked.

(iii) A has taken administration to the estate of B as if he had died intestate, but a will has since been discovered.

And perhaps removal may also be obtained under s. 73 of the Trusts Act 11 of 1882, by treating the executor or administrator as a trustee.

(b) the grant was obtained fraudulently by making a false suggestion, or by concealing from the Court something material to the case ; or

(c) the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant, though such allegation was made in ignorance or inadvertently ; or

(d) the grant has become useless and inoperative through circumstances ; or

(e) the person to whom the grant was made has wilfully and without reasonable cause omitted to exhibit an inventory or account in accordance with the provisions of Chapter VII of this Part, or has exhibited under that Chapter an inventory or account which is untrue in a material respect.

Probate or letters of administration supersede.—

I. S. A. s. 215.

(1) A grant of probate or letters of administration in respect of an estate shall be deemed to supersede any certificate previously granted under Part X¹ or under the Succession Certificate Act (VII of 1889) or Bombay Regulation No. VIII of 1827,² in respect of any debts or securities included in the estate.

(2) When at the time of the grant of the probate or letters any suit or other proceeding instituted by the holder of any such certificate regarding any such debt or security is pending, the person to whom the grant is made shall, on applying to the Court in which the suit or proceeding is pending, be entitled to take the place of the holder of the certificate in the suit or proceeding.

Provided that, when any certificate is superseded under this section, all payments made to the holder of such certificate in ignorance of such supersession shall be held good against claims under the probate or letters of administration.

1 I. S. A. 372 Application for such a certificate shall be made to the District Judge.

2 In the Bombay Presidency any claimant may instead of taking out probate or letters of administration or a succession certificate apply under Regulation VIII of 1827 to the District Judge for recognition as heir or executor or legal administrator.

§ 3. *The rules for succession and administration applicable to Muslims in British India.*

This part of Anglo-Muslim Law is entirely the result of judicial and legislative development. It may be briefly stated as follows :—

(1) The whole estate of a deceased Muslim at the moment of his death vests in his heir one or more in specific shares and “such devolution is not contingent upon or suspended till payment of such debt.” Though the estate devolves immediately upon the legal representatives, it is charged with the debts of the deceased, and the heirs are the persons through whom the property could be reached by the creditors to obtain satisfaction of the debts.¹

The property in fact is assigned to the heirs by mutual consent or judicial authority after meeting funeral expense, all debts and legacies, however if the distribution takes place before the payment of debts, then each heir becomes liable to each creditor of the deceased to the extent of the assets for a proportionate payment from his distinct share towards the discharge of the whole debt.

¹ This is the view taken by the High Courts in British India, vide *Jafri Begam v. Amir Muhammad Khan* 7 All. 822 (1885) F. B. “upon the death of a Muhammadan intestate, who leaves unpaid debts (whether large or small with reference to the value of his estate) “the ownership of such, estate devolves immediately on his heirs, and such devolution is not contingent upon, or suspended till payment of such debts.” The Calcutta High Court in *Amir Dulhin v. Baijnath Singh* 21 Cal. 331 (1894) observed that ‘the estate of a deceased person devolves immediately upon his heirs, charged however, with his debts’ vide also *Bibi Hafsa v. Kaniz Fatma* 96 I. C (Pat. 1925). The contrary view was taken in *Assamthen Nissa Bibee v LutchmEEPut Singh* 4. Cal. 142 (1878).

If the whole estate is in the hands of a single heir the creditors are entitled to have recourse to that particular heir only. Vide *Hamir Singh v. Zakia* 1 All. 57 (1875). And according to *Pirthipal Singh v. Husaini Jan* 4 All. 361 (1882) each heir is liable to proportionate payment of the debts with regard to his own share of the estate, vide also *Ambasnhankar v Sayad Ali* 19 Bom. 278 (1894) and *Bussentram v. Kamaluddin* 11 Cal. 421.

The property vests in the heirs in specific shares analogous to tenants-in-common, *Abdul Khader v. Chidambaran* 32. Mad. 276 (1909); *Abdul Majid v. Krishnamchariar* 40 Mad. 243 (1917); *Mahommad Ahmad v. Ansar Mahommad* 56 I. C. 803 (Oudh 1920).

(ii) The claims of the creditors of the deceased are preferred to those of the creditors of any particular heir whose share is being taken to discharge the debts of the deceased.¹

(iii) However if there be an executor of the deceased the property would vest in him and not in the heirs in specific shares, and he will be responsible for payment of debts, etc.

Similarly if letters of administration have been granted the property would vest in the administrator and not in the heirs of the deceased.

(iv) The Muslim heir is not bound to bring a suit for its administration nor is he liable to bring a suit for partition, unless he desires to have his specific share, which vested in him on the death of the deceased, marked out and partitioned from the whole property. He can even sue for partition in a particular portion of the estate and not for general partition.

(v) A co-heir who obtains possession of the property of the deceased is in the position of a co-sharer and hence his possession cannot be adverse to the other co-heirs in the absence of express ouster or denial of the title of other co-heirs.²

(vi) Under the Limitation Act 1908. Schedule I Art. 144, and not article 123 nor 127 govern the period of limitation in respect of a suit brought by a co-heir to recover his share by partition. The limitation does not run from the death of the deceased, but from the time the possession of the defendant becomes adverse to the plaintiff.³ The period is twelve years.

¹ It is obvious that the creditors of the deceased should be preferred to the creditors of the heir himself. Hence a claim of the widow for dower was preferred, it being against the deceased husband, vide *Bhola Nath v. Maqbulunnissa* 26 All. 28 (1908).

² Vide *Vazir v. Dwarkomal* 79 I. C. 841 (Sindh 1922) and further the possession of one co-heir cannot be deemed to be adverse to other co-sharers unless there has been an explicit and clear denial of title, if so adverse possession can be pleaded, vide *Mubarakunnissa v. M. Raza Khan*. 79 I. C. 174 (All. 1921.)

³ That Art 127 is not applicable is held in *Isap Ahmed v. Abhranji* 41 Bom. 588 (1917) reversing its previous decisions *Bavesha v. Masumsha* 14 Bom. 70, *Fatma v. Ghisambo* 33 Bom. 719 and following *M. Akram Shah v. Anarbi* 22 Cal. 954, *Amme Raham v. Zia Ahmed* 18 All. 288. *Palcha v. Mohidin* 15 Mad. 57, vide also *M. Wali Khan M. Mohiuddin* 58 I. C. 843. As to applicability of Art. 144 vide *Kallangowala v. Bibishaya* 44 Bom. 943, (1920), *Nuruddin v. Bu Umro* 45 Bom. 519. *Zainab v. Ghulam R sul* (1928) 4 Lah. 402 78 I. C. 425.

Alienation by an heir and creditor's rights.—

(i) An heir-apparent cannot lawfully transfer the mere possibility, chance of succession to a living person, nor can he renounce his expectant right,¹ but a legal heir to a deceased person is competent to transfer his own share by sale or mortgage even before distribution of the inheritance amongst the heirs, and a transferee, acting in good faith without notice of the debts, would get a good title, but if the transferee had notice of the debts, the creditor can follow the estate in the hands of the transferee, provided the assets in the hands of the heir are insufficient to discharge the debts. A secured creditor, such as a mortgagee, can always follow the property to recover his debt under the general law in British India.

(ii) A transfer of property by the heir during the pendency of a creditor's suit would be affected by the doctrine of *lis pendens*, and would be voidable at the instance of the successful creditor in the pending litigation.

Voluntary transfer by an heir in possession.—

(iii) In case of voluntary transfer by one or more of several heirs in possession of the inheritable estate, it being still undistributed, to a purchaser whether with or without notice of the rights of other co-heirs, the Calcutta High Court has held, that a *bona fide* purchaser or a mortgagee acquires a good title to the property both as against other co-heirs and the creditors of the deceased, unless it was already affected by *lis pendens*;² but according to the view

1 Vide the Transfer of Property Act VI of 1882 S. 6 (a) *Sumsoodin v. Abdu Husain* 31 Bom. 165 (1906). *Asa Beevi v. Karuppan Chetty* 41. Mad. 395 (1917), *Abdul Wahid v. Nuran Bibi*, 11 Cal. 597, (1885); *Hasan Ali v. Nazo* 11 All 456 (1889) Thus contingent right of inheritance cannot be surrendered or transferred for an heir-apparent has no such reversionary interest in the property "nemo est heres viventis"—a living person has no heir. Similarly he cannot validly renounce his expectant claim. Vide *Macnaghten Precedents Inheritance Case 11*; *Khanum Jan v. Jan Beebee* 4 S. D. A. 210 (1827) (Bengal) and above noted cases 61 Bom. 165, 41 Mad. 365, (*Kunhi Mamod v. Kunbi Moidin* 19 Mad. 176 (1896), a contrary decision).

2 It is difficult to support the High Court of Calcutta, unless you accept the fiction that the alienor, heir, transferred the property in a representative character. The leading case is that of *Land Mortgage Bank v. Bidyadhari* 7. C.L.R. 460 (1879) following *Bazayet Hossein v. Dooli Chand* 4 Cal. 402. 5. I.A. 211 (1878), *Mahomed Wajid v. Tayyuban* 4 Cal. 402. "The creditor of a deceased Mahomedan cannot

supported by judicial decisions *viz.* that the deceased's property vest in each heir in specific share in terms of his share of inheritance, it logically follows that such a transfer by an heir in possession of the entire property is voidable, it remains effective only as against the transferor and his interest in the property.¹

Involuntary transfer by an heir in possession.—

(iv) If a creditor of the deceased sues the heir in possession,² the estate being still undistributed, without joining other heirs, and

follow his estate into the hands of a bona fide purchaser for value, to whom it has been alienated by the heir-at-law, whether the alienation has been by absolute sale or by mortgage. But where the alienation is made during the pendency of a suit in which the creditor obtains a decree for the payment of his debt out of the assets of the estate which have come into the hands of the heir-at-law, the alienee will be held to take with notice, and be affected by the doctrine of "lis pendens."

Vide, *Yasin Khan v. Muhammad Yar Khan* 19 All. 505 (1897), while a suit for the dower debt was pending on behalf of a Muslim widow, the heirs of her deceased husband mortgaged some property of the deceased. The widow's heirs obtained a decree. Held that this decree took priority over the mortgagee's decree and a sale held in execution thereof.

1 Vide *Naraindas v. Obhai* 19 I. C. 911 (Sindh 1912) F.B.

The case of a transfer by an heir in possession may amount to a transfer by an ostensible owner which would apparently present some difficulty. Several Judicial decisions on section 41 of the Transfer of Property Act are conflicting. In *Must: Muharakunnissa v. Muhammad Raza* 79. I.C. 174. (All. 1924). "Where a Muhammadan co-heir permits another co-heir to obtain possession of the entire property of the deceased and to get himself recorded in the revenue papers, as sole owner, and the latter makes an alienation of the property, the alienation cannot be avoided by the other co-heir, where it is found that the transferee acted in good faith and gave consideration for the transfer, and that there was no circumstances which could have put the transferee on enquiry." "The plaintiffs had by their conduct or omission allowed the defendants to get their names entered in the Revenue Papers. But if the transferee being aware of title of the original owner, omits to make further enquiry as to how that title passed from the original owner to the transferor, he is not entitled to uphold the transfer. *Muhammad Sulaiman v. Sakina Bibi* 69. I.C. 701. 20. A.L.J.R. 654, where a lady proceeded to Mecca leaving her house in charge of a relation. Three years later this person sold the house. The lady on her return sued for possession. Held that the manager could not be treated as ostensible owner within the meaning of Sec. 41 of Transfer of Property Act as the transferee took no reasonable care to ascertain facts, so she was not bound by the sale.

2 If there had been an executor or administrator the suit will lie against him by a creditor of the deceased.

obtains a decree, and a sale is effected in execution of the decree of the entire property of the deceased in possession of that heir, then according to the Calcutta High Court, the sale will convey to the purchaser the interest of all the heirs of the deceased, although they were not parties to the suit, unless it is established that the debts were not due. However according to the majority of the High Courts the heirs who were not parties to the suit cannot be bound by it, with the result that the execution purchaser would acquire an interest proportionate to the share of the inheritance to which that heir was legally entitled.¹

1 In *Muttyajan v. Ahmed Ally* 8 Cal. 370 (1882) followed in *Amir Dulhin v. Baij Nath* 21 Cal. 311 (1894), the Calcutta High Court came to this conclusion with great emphasis, that it embodies a salutary rule, disapproving some observations made by Mahmood J. in *Jafri Begum v. Amir Muhammad* 7 All 822 (1883) where the learned Judge of the Allahabad High Court had closely examined some of the previous decisions of the Calcutta High Court notably *Assamaathem Nissa Bibi v. Roy Lutchmeeput Singh* 4 Cal. 142 and *Muttyjan v. Ahmed Ally* 8 Cal. 370, and with reference to the last case had observed thus: "Morris J. with the concurrence of O'Kinealy J. went the length of laying down the broad rule that when the creditor of a deceased Muhammadan sues the heir in possession, and obtains a decree against the assets of the deceased, such a suit is to be looked upon as an administration suit and those heirs of the deceased who have not been made parties cannot in the absence of fraud, claim anything but what remains after the debts are paid... ..It seems to me that the nature of an administration suit is essentially different from an ordinary suit for money brought by a creditor of a deceased person against his heir," and further in course of his judgment Mahmood J. observed ".....I hold that a decree obtained by a creditor of a deceased against some of his heirs will bind also those heirs who were not parties to the suit, amounts to giving a judgment inter partes, or rather a judgment in personam the binding effect of a judgment in rem, which the law limits to cases provided for by s.41 of the Evidence Act. But our law warrants no such course, and the reason seems to me to be obvious. Mahomedan heirs are independent owners of their specific shares, and if they take shares subject to the charge of the debts of the deceased, their liability is in proportion to the extent of their shares. And once this is conceded, the maxim '*res inter alias acta alteri nocere non dabet*,' apply without any such qualifications as might possibly be made in the case of Hindu co-heirs in a joint family." The Calcutta High Court 21 Cal. 311 considered these remarks but preferred to follow its old rulings observing, "If the creditor of a deceased Mahomedan is to be confined to the recovery of a fractional portion of his claim, notwithstanding that the assets may be wholly in the possession of the person through whom it is sought to enforce it, or is to be postponed until the estate has found its way into the hands of all the persons who are entitled to share in it as might frequently be the case

(v) If the estate has been distributed amongst the heirs, then the creditor is only entitled to recover from any heir an amount proportionate to his share of the inheritance towards payment of the debts of the deceased. The creditor can not obtain a decree for the whole amount as against a particular heir.

(iv) The Bombay High Court dissenting from its previous ruling now agrees with the view taken by the High Court of Allahabad.¹

we can perceive that very great injustice might in many cases be perpetrated and a method sanctioned by which it would be easy to place obstacles in the way of realisation of the just obligations cast upon the estate..... it has been held by a judge of much experience that, when a person possesses himself of the assets of an intestate without having administered a bill for an account of the specific assets he has received would lie against him as executor de son tort though there be no legal personal representative (*Coote v. Whittington* L.R. 15 Eq. 534). And although the analogy may not be complete between the Mahomedan heir who is in possession of more than his share of the inheritance and the executor de son tort of English Law, it is yet sufficiently close to sustain comparison."

The two High Courts thus materially differ in their point of view, and perhaps it is too late to decide this point anew on the authority of original authorities, and since this question has also been treated from the point of view of general Law in England and in British India, it appears that the main point is whether the inheritance vests immediately in the heirs, or should we accept the theory of Roman lawyers "*hereditatem dominam esse et defuncti vicem obtinere*" that the estate itself is owner and stands in the place of the deceased as remarked by Markby J. in 4 Cal. 142, the latter view advocating the vacant-succession theory has been given up even by the Calcutta High Court, hence we once more fall back on the immediate vesting theory, and thus the Allahabad view may be preferred. However such circumstances may actually occur which would make it that on grounds of equity an heir though no party to the decree should not be allowed to recover possession of his share from the auction-purchaser except on the conditions of paying his own share of the debt determined in reference to his specific share. This would be according to the maxim "He who seeks equity must do equity."

¹ In *Khursetbibi v. Keso* 12 Bom. 101 (1887) The Bombay High Court followed the Calcutta High Court and it reaffirmed the same view in *Davalava v. Bimaji* 20 Bom. 338 (1895). It dissented from this view in *Bhagirthibai v. Rosanbi* (1919) 43 Bom. 412, and held that decree against one of several heirs is not binding on the other heirs, vide also the recent case of *Lala Mia v. Manubibi* 47 Bom. 273, (1928), 73 I.C. 246.

The High Court of Madras seems now to be of the same opinion as the Allahabad High Court.¹ The later decision however refers to the case of voluntary transfer by an heir in possession which will not be binding on the other co-heirs or creditors.

¹ Similarly the old Madras case *Pathummabai v. Vittil* 26 Mad. 734 has been overruled by *Abdul Majeeth v. Krishnamachariar* 40 Mad. 243 (1915) F. B. If a co-heir in possession happens to be a guardian of other heirs, and sells the property in good faith to discharge ancestral debts, etc., such a sale is valid. *Hasan Ali v. Mehdi Husain* 1 All. 533 (1877). This case has been disapproved of in 40 Mad. 243 supra.

The majority is thus clearly in favour of the view taken by the Allahabad High Court in *Jafri Begum v. Amir Muhammad* 7 All. 822.

CHAPTER VIII

§ 1. LAW OF INHERITANCE—‘ILM-UL-FARAIZ.’

The Muslim Law of Inheritance, *Ilm-ul-Faraiz* is a great achievement of the Muslim jurists. In its minutest details it is a system rendered to perfection, Macnaghten accordingly observes. “In these provisions we find ample attention paid to the interests of all first rank of our affections; and in deed it is difficult to conceive any system containing rules more strictly just and equitable.”¹

The tribute paid by Rumsey is no less exalted. He says, “The Mohammadan Law of inheritance comprises beyond question, the most refined and elaborate system of rules for the devolution of property that is known to the civilised world.....”.²

The Muslim Law of inheritance, *Ilm-ul-Faraiz*, prescribes the mode and manner of succession to a deceased Muslim. After incurring funeral expenses befitting the social status of the deceased and after payment of his debts in full, all legacies must be paid out of a third of what remains, and finally the whole of the residue is distributed amongst the heirs by right of inheritance. Under the Muslim Law, there is no distinction between ancestral and self acquired property, nor between real and personal property, and from mere fact of commensality, the heirs continuing to live together, no pre-sumption as to existence of joint family arises. The distribution is effected among the near blood relations of the deceased provided they are in existence at the time of the death of the deceased. The claimants must establish the cause of inheritance which is based upon near relationship, and there should be no impediment to inheritance.

¹ Principles and precedents, preliminary remarks p. v.

² Inheritance Muhammadan Law, preface 1.

³ There is no joint family property vide *Mohideen Bee v. Syed Mir. Saheb* 38 Mad. 1099 (1915), *Hakim Khan, v. Gul Khan* 8 Cal. 826 (1882).

The Heirs in General.

A number of blood relations of the deceased are entitled to participation in the inheritance simultaneously. They are divided in three distinct groups the *Zav-ul-Furuz*, the *Asabah*, the *Zav-ul-Arham*, and the other classes of heirs follow next in order.

- (1) *Zavul-Furuz, the Sharers.*
- (2) *Asabah, the Residuaries.*
- (3) *Zav-ul Arham, the Distant Kindred.*
- (4) *Successor by contract.*
- (5) *Acknowledged Kinsman.*
- (6) *Universal legatee.*
- (7) *Bait-ul-mal, Treasury.*

The general law in British India has not affected the Muslim law of inheritance relating to the sharers, residuaries and other heirs, but it has introduced the law of escheat to Crown. Under the Muslim Law, finally and lastly in the absence of all above classes of heirs, the inheritance devolves upon the *Bait-ul-mal*, the public treasury for the benefit of all Muslims. Under the *Shia* Law, there is no escheat to *Bait-ul-mal*, but the property is to be liquidated among the poor of the city. In default of all the heirs and persons enumerated above and in British India in preference to the poor or *Bait-ul-mal*, there being no such public treasury in India, the whole property of a deceased Muslim escheats to the Crown. The leading case is the *Collector of Masulipatam v. Cavalry* 8 Moo. I. A. 498 (1860) (a Hindu case), where the Privy Council observed when it is made out clearly that by the law applicable to the last owner there is a total failure of heirs, then the claim to the land ceases (we apprehend) to be subject to any such personal law.....the law of escheat intervenes and private ownership not existing, the State must be owner as ultimate Lord."

The question again came up before the Patna High Court in *Khursadi Begum v. Secretary of State* 94 I. C. 433 (Pat 1926) where it was raised under the *Shia* law, the *Shia* community of Gaya represented by their Anjuman had sued the Secretary of State the Court held that the law of escheat prevailed.

Primogeniture--Exclusion of sons, daughters.—

Under the *Hanafi* Law the rule of primogeniture is not recognised, all sons inherit equally along with the eldest son. But under Anglo-Muslim Law if a custom of strict primogeniture is established then it may be followed. Under the *Shia* Law the eldest son is entitled to his deceased father's signet ring, sword, Koran, and garments provided there are also other assets besides these articles.

The rule of primogeniture has been applied by the Courts in *Mahomed Akul Beg v. M. Kayum Beg* 25 W. R. 199 (1876) ; *Ibrahim Ali Khan v. M. Ahsanullah Khan* P. C. 39 Cal., 711 (1911) (the Kunjpura estate case.) The Oudh Estate Act 1 of 1869 Sec. 22 recognises the rule of primogeniture for the taluqdars and prescribes comprehensive rules.

Under the Muslim Law the daughters are also entitled to specific share of inheritance, but under Anglo-Muslim Law if there is valid custom excluding daughters from inheritance, it would be followed. In *Jammya v. Diwan* 23 All. 20 (1900) evidence was held to be inadmissible to prove any custom inconsistent with the Muslim Law, "regarding, succession, inheritance, marriage.....or any religious usage or institution" (s. 37 of Bengal Civil Courts Act XII of 1887). The same view was followed in *Ismail Khan v. Imtiaz-un-nissa* 4 A.L.J.R. 793 (1907). However on appeal *Muhammad Ismail Khan v. Lala Sheokmukh Rai* 17 C.W.N. 97 (1912) the Privy Council overruled the view taken by the Allahabad High Court and held that evidence as to family custom should be taken. But my submission is that the view taken by the Allahabad High Court is correct and justifiable, and to hold it otherwise would amount to an interference with the Muslim personal Law. In *Ali Asghar v. Collector of Bulandshahr* 39 All. 574 (1917) evidence of such family custom was held admissible. And in *Muhammad Kamil v. Must. Imtiaz Fatima* 36 I.A. 210 (1908), the Privy Council held that where daughters are excluded by custom they should be treated as non-existent for determining shares of heirs.

§ 2. *Impediments to succession.*

According to the Sirajiyah there are four impediments to succession, (i) Slavery, (ii) Homicide, (iii) Difference of religion,

LAW OF INHERITANCE

(iv) Difference of country, and of these the first and the last two impediments have been materially affected by Anglo-Muslim Law.

Slavery.—

That the fact of slavery of the claimant is an impediment to succession has now become obsolete in British India by the Slavery Act V of 1843.¹

Difference of religion.—

A non-Muslim is not entitled to inherit from a Muslim, and a Muslim also cannot inherit from a non-Muslim by birth.

Apostate.—

Under the Muslim Law if an apostate from Islam has died, then his estate devolves on his Muslim heirs,² but he himself cannot inherit from his Muslim relations, however under Anglo-Muslim Law he is entitled to inherit and *vice versa*. The caste Disabilities Removal Act XXI of 1850 has removed the disabilities of an apostate heir to inherit whether from a Muslim or from a non-Muslim by birth or by apostasy. The Act says, "So much of any law or usage now in force within the territories subject to the Government of the East India Company as inflicts on any person forfeiture of rights or property, or may be held in any way to impair or affect any right of inheritance, by reason of his or her renouncing or having been excluded from the communion of any religion, or being deprived of estate, shall cease to be enforced as law in the Courts of the East India Company and in the courts established by Royal Charter within the said territories."³

1 Vide *Ujmuddin v. Zialulnissa* 3 Bom. 422 (1879).

2 According to some jurists and also the Shafi jurists the acquisition of an apostate after his apostacy, goes to the Bait-ul-mal.

3 Vide *Khunni Lal v. Gobind Krishna Narain* 38 All. 356 (1911), and S. 9 of the Bengal Regulation Act of 1832.

In *Vaithilinga Odayar v. Ayyathorai Odayar* 40 Mad. 118 (1917), the court held that the Act XXI of 1850. does not benefit the descendants of converts, thus dissenting from *Bhagwant Singh v. Kallu* 11 All. 100.

If a person apostatises and dies, then curiously according to *Abdul Gaffar v. Ma Piya Shin* (Rang. 1926) 98 1. C-155. his Muslim father cannot inherit, but under the Muslim Law he is entitled to inherit.

Difference of country.—

It still appears that a non-Muslim by birth would be excluded from inheriting from a Muslim as provided by the Muslim Law.

Under the Shia Law want of Islam on the part of the claimant is the only bar to inheritance, that is, the property of any deceased person whether a Muslim or non-Muslim can be inherited by a Muslim heir.

Under the Muslim Law, Muslims though owing different allegiance are entitled to succeed to each other, but non-Muslim residents domiciled in a Muslim State are not so entitled. In the modern International Law, this involves the question of allegiance, nationality, and domicile and under Anglo-Muslim Law an alien enemy of the British Government cannot inherit the property of any British subject including Indian Muslims.¹

Missing persons, and heirs.

A "missing person" is a person who cannot be traced at all, his whereabouts being unknown, it being uncertain whether he is living or dead.

No one can succeed to the estate of a missing person, until his death is established or a certain period has elapsed. Under the old Muslim Law, the period was ninety years from the date of the birth of the missing person, and according to some jurists it is four years from the date of missing. This is also the Maliki Law and the period under the Shafi Law is seven years, and under the Shia Law it is ten years. Under Anglo-Muslim Law it would be governed by the Indian Evidence Act (Sections 2, 107 and 108), which provides thus:—"When the question is whether a man is alive or dead, and it is proved that he has not been heard of for seven years by those who would naturally have heard of him if he has been alive, the burden of proving that he is alive is shifted to the person who affirms it."²

A missing heir cannot inherit, unless he reappears within the period of presumption of life as stated above. Under the Muslim

¹ Vide the Aliens Act 1904 5 Edw 7. C. 13 and the Aliens Restriction Act 1914. 4 and 5 Geo. 5-C-12.

² As to missing persons and heirs. Vide *Mazhar Ali v. Budh Singh* 7 All. 297, *Jafri Begum v. Amir Muhammad* 7 All. 822. *Moolla Cassim v. Moolla Abdur Kahim* 321. A. 177, 38 Cal. 173.

Law his share of inheritance is reserved in case, he should present himself, and after the expiry of the period, the reserved portion would be distributed again.

Illustration.

A person leaves two daughters, a missing son and a son's son.

	Two daughters.	Missing son.	son's Son.
I. If the missing son is alive	$\frac{1}{2}$	$\frac{1}{2}$	0
	$\frac{3}{6}$	$\frac{3}{6}$	0
II. „ „ is dead	$\frac{2}{3}$	0	$\frac{1}{3}$
	$\frac{4}{6}$	0	$\frac{2}{6}$

The two daughters may take $\frac{3}{6}$, but nothing can be given to son's son, and residue $\frac{3}{6}$ will be reserved, if the son presents himself within the period, he takes $\frac{3}{6}$, if not the daughters will again take $\frac{1}{6}$ and the residue $\frac{2}{6}$ will go the son's son.

Communities.--

Some of the Indian communities who have accepted Islam have preferred to continue to be governed by their old personal Law. Thus the Muslim Khojas and Cutchi Memons in the Bombay Presidency are governed regarding succession and inheritance by the Hindu Law in preference to the Muslim Law.¹ The same is provided now in the Cutchi Memons Act XLVI of 1920 and the Cutchi Memons Amendment Act XXXIV of 1923. Similarly in matters of succession and inheritance the Muslim Borahs of Gujrat ² and the Mulesalman Girasies of Broach ³ are governed by the Hindu Law and among the Lubbais of Coimbatore ⁴ the daughters are excluded by the son. The Halai Memons follow the Muslim Law. ⁵

¹ Khojas and Memon's case (1847) Perry's O. C. 110. Hirabai v. Gorbai 12 Bom. H. C. 294 (1875), [Khojas]. Abdul Cadur v. Turner (1884) 9 Bom. 158 (Cutchi Memons). Moosa Haji Joons, v. Haji Abdul Rahim 30. Bom. 107 (1905). Jan Mahomed v. Datu 38 Bom. 449 (1914).

² Bai Bajpai v. Bai Santok 20. Bom. 58 (1894).

³ Fatesangji v. Harisargji (1894). 20 Bom. 181.

⁴ Shaikh v. Muhammad 39 Mad. 664 (1916).

⁵ Khatubai v. Mahomed Haji 58 I. A. 108.

In *Azmat v. Lalli Begam* 8 Cal. 422 it was found that by custom widows were not entitled to inherit as sharers. The history of the Khojah community is contained in a judgment by Mr. Justice Arnold in the Advocate General ex-relatione *Daya Muhammad v. Muhammad Husen Huseni* (Aga Khan) 12 Bom. H.C.R. p. 323 (1866). The Khojahs were converted by Pir Sadrud Din about 450 years ago. The term Khojah is deemed to imply "worshipful converts" The first case in which it was laid down that the Khojahs were governed by Hindu customs, arose in 1845. *Hirbai v. Sonabai* (1845) Perry's Oriental cases 110. The judgment was delivered by Sir Erskine Perry, it is quoted at great length in Ameer Ali's Muhammadan Law (5th edition) p. 136 In *Herbai v. Gorbai* 12 Bom. H. C. R. 294 (1875). and *Rahmat bai v. Hirbai* 3 Bom. 34 (1877), *Ashabai v. Tyeb Haji Rahmut-ullah* 9. Bom. 115, and in *Abdul Cadur v. Haji Mahomed Turner* the view was held that the Khojas and Memons retain their Hindu Law of inheritance, and that the onus of proving a custom of inheritance not in harmony with the Hindu Law would be upon persons setting up that custom. Vide also *M. Sideek v. Ahmed* 13 Bom. 280 (1885) and *Cassumbhoy v. Ahmedbhoy* 13 Bom. 534. (1885).

CHAPTER IX

WAQF-CHARITABLE DEDICATIONS

1. *The management of waqf by the State*

The law of *waqf* is an important branch of the Muslim Law. Its origin is traced to a famous hadis. Umar bin Khatab spoke to the Prophet that he had some land at Khaibar and what shall he do with it to be pleasing to god. The prophet replied. "Tie up the property ('*asl*, corpus) and devote the usufruct to human beings, and it is not to be sold or made the subject of gift or inheritance ; devote its produce to your children, your kindred, and the poor in the way of God" Umar accordingly dedicated this property. According to Maulana Shibli the first instance of *Waqf* is that of the mosque in Medina by the Prophet himself.¹

Waqf literally means "tying up," or "detention" In the language of law according to Imam Abu Hanifa, "It signifies the appropriation of any particular thing in such a way that the appropriator's right in it shall continue, and the advantage of it go to some charitable object."² According to *Sahiban*, the two disciples, *waqf* is "the detention of a thing in the implied ownership of Almighty God in such a manner that its profits may revert to or be applied for the benefit of mankind."³ The *Fatawa* accords with the view of the disciples. The essential feature of the *waqf* is that the *Corpus* is to remain intact, and its income is to be applied for religious, pious and charitable purposes as recognised by the Muslim Law. It is due to this fact that the Muslim States were always directly or indirectly interested in the administration of *Waqfs*. During the *Umayyad Khilafat* the kazi exercised complete supervision over the administration of *Waqf* properties.⁴

¹ Vide *Siratus Nabf* Vol. 1 p 241.

² Hamilton *Hedya* 231

³ Baillie *Digest* 550.

⁴ *The Administration of Justice of Muslim Law* by the present author p. 30,

In the time of the *Abbaside Khilafat*, the President of the *Nazir-ul-Mazalim*, the board for the inspection of grievances, which controlled the judiciary in the time of the *Umayyad* supervised the administration of *waqf* properties.¹ In India the Moghul Emperors took interest in the organisation and administration of charities. *Ain-i-Akbari* states that the Emperor bestowed favours upon pious men and lands and pensions were granted to four classes of men “(a) The learned and the scholars, (b) Those who had bid adieu to the world, (c) The needy who are not able to help themselves, (d) The descendants of great families who, from a false shame will not submit to follow any occupation for their support. When a ready-money allowance is given to those, it is called *Wazeefah*, and land so bestowed is named *meelk*, and *muddulmash* and in like manner crores were given away.”* This department was under a *sadr* assisted by *Mir adl* and *Bitukchi* called the *Dewan Saadat* appointed to keep a register of all transactions of this department. The *Ain-i-Akbari* adds “His Majesty (Akbar) out of his righteousness, is constantly alive and attentive to this department, and is careful to appoint disinterested people to the office of *Suddarut Juz and Kull*”.* This arrangement continued till the break up of the Moghul Empire long after the death of Aurangzeb. At the time of the East India Company the English who had witnessed the extent of State control and management of Public Hindu and Muslim endowments very naturally made an attempt to continue the same policy, and the preamble to regulation XIX of 1810 of the Bengal code supports this view. It is stated therein that the Board of Revenue may appoint person or “persons nominated for their approval, or will make such other provision for the trust, superintendence and management as may be right and fit with reference to the nature of conditions of the endowments, having previously called for any requisite further information from the local agents.” Sir Alfred Lyall has well summarised the policy of the company in

* Gladwin F., “*Ayeen-i-Akberi*,” pp. 186-189. H. Blochman, *Ain-i-Akbari*, Vol. 1, 268, chapter on *Sayur ghals*. The original *Ain-i-Akbari* by Abu Fazl, Nawal Kishore Press, pp. 140-141.

1 The Administration of Justice of Muslim Law by the present author, p. 81

continuing to supervise the public endowments, he says, "We continued, as a great rising Power, to survey all religions (including Christianity) with the most imperturable and equitable indifference we tolerated every superstitious rite or custom to the extent of carefully protecting it; any single institution or privilege of the natives that had in it a tincture of religious motive was hedged round with respect, endowments were conscientiously left untouched, ecclesiastical grants and allowances to pious persons were scrupulously continued; in fact the Company accepted all these liabilities created by its predecessors in rule as trusts, and assumed the office of Administrator-General of charitable and religious legacies to every denomination.* Thus we may say that the East India Company had cheerfully accepted the traditional policy of supervision of the public endowments by the governing power. It was in keeping with this policy that the temple of Jagannath was assured of protection on the annexation of Cuttack. The Madras Regulation VII of 1817, and the Bombay Regulation 1827 follow the same policy as the above Bengal Regulation. The State control, supervision and maintenance of endowments was maintained with remarkable thoroughness and generosity with the result that it excited indignation of the Christian Missionaries and their supporters.¹ The agitation continued both in India and in England, till at last the policy of the Company changed. The climax came with the passing of the Endowment Act XX of 1863 which repealed part of the Bengal Regulation XIX of 1810 and the Madras Regulation VII of 1817 relating to endowments for the support of mosques, tempels etc. It was in effect a virtual surrender of the traditional

*Lyall. A. C. Asiatic Studies (first series) Ch. VIII "Our Religious policy in India" p. 269.

¹ A member of the Bengal Board of Revenue with reference to the repairs to the Hoogly Imambara in 1838 observed, 'It is deeply distressing for me to receive orders from the Government which I cannot execute without grievously offending my conscience I must respectfully but earnestly entreat that I may not be required to make myself an instrument for the maintenance and embellishment of an edifice dedicated to worship which I am conscientiously persuaded is not that of the true God...' Parliamentary Papers cited in Lyall. A Asiatic Studies p. 277. "In 1858 the Bombay Missionary Conference called upon the Government to stop customary money grant to non-Christian endowments observing, "Even if treaties bind us to support heathen temples the obligation forbidding such treaty is for superior as imposed by God Himself, which (obligation) cannot be set aside without drawing down the displeasure of the Alimighty." Parliamentary Papers ibid p. 286.

policy of State supervision and a solemn declaration not "to undertake or resume the superintendence of any land or other property granted for the support of, or otherwise belonging to, any mosque, temple or other religious establishment or to take any part in the management or appropriation of any endowment, made for the maintenance of any such mosque, temple, or other establishment or to nominate or appoint any Trustee, Manager, or Superintendent thereof, or to be in any way concerned therewith."¹

The Act XX of 1863 was much condemned. Dr. Shafaat Ahmad Khan in his short pamphlet "The administration of Muslim *waqfs*." observes, "The Muslims complained immediately after the passing of the Act that the English Government was abdicating one of its most essential functions by refusing any longer to superintend the religious endowments of the country, as had been the immemorial custom and obligation of Moghul Emperors."² Whatever may be the reasons, political or otherwise for abandoning the traditional policy of supervision, there is no doubt that after the relaxation of State control, the management of *waqfs* deteriorated, and in some cases its money was misapplied and misappropriated. This state of affairs continued for a long time. The provisions contained in Section 92 of the Civil Procedure Code 1908, and those in the Charitable and Religious Trusts Act XIV of 1920 for directing accounts, enquiries removing or appointing a new trustee did not meet the requirements of the situation. The history leading up to the waqf Act XLII of 1923, fully illustrates this point. The bill was moved by Mr. Abul Kasim and it was circulated in 1921 the views of the Local Governments having been ascertained in favour of the measure³ the bill was referred to the select committee on February

1 Sec. 22 Act XX of 1863.

2 P. 18.

3 The Madras Government was the most emphatic in its indictment. "Enlightened Muhammadans in this, as in the other Presidencies are practically unanimous that a very large number of endowments made by pious Muhammadans in the past have been wasted or converted to the private benefit of individuals, contrary to the wishes of the original founders; that their administration in many cases has come to rest on the hands of inefficient and unscrupulous mutawallis, and that effective measures, should be adopted at an early date for preventing waste and mismanagement of the Muhammadan Public Trusts, and to ensure that the endowments are appropriated to the purposes for which they were founded." The Legislative Assembly Debates Official Report 1923 Vol. III p. 2811.

15th 1923 and finally the report of the committee was presented on March 22nd. Sir Malcolm Hailey observed that from the point of view of the Government when the bill originally came "it involved an organisation of managing committees by Government and a very considerable amount of control to be directed by Government. I may say at once that the Government was opposed to any such proposal. This feature of the bill has, however, been excluded. The only burden which the bill now places on the Government is the receipt of accounts. For the rest it will merely be for the Civil Courts to take action on the motion of persons interested in these *waqfs*."¹ The Bill was passed into Law in the same year. Personally I am not much enamoured by this half hearted measure which can only be described as a weak supplement to existing enactments. It is no substitute for the traditional policy of the Islamic States to supervise and control *waqf* properties. The present Act XLII of 1923 would only deal with cases where the existence of public *waqf* is admitted, and if this is disputed then recourse can only be taken to the Trusts Act XIV of 1920. The simple aim of the *Waqf* Act 1923 is to provide regular furnishing of accounts after being duly audited and that is all.

§ 2. *The law in British India relating to Charitable Endowments.*

The following enactments relating to public trusts are applicable in British India, and it is submitted they also affect the Muslim Law of public *waqf*.

- (a) The Religious Endowments Act XX of 1863,
- (b) The Official Trustees Act II of 1913.
- (c) The Charitable Endowments Act VI of 1890
- (d) The Code of Civil Procedure 1908, s. 92.
- (e) The Charitable and Religious Trusts Act XIV of 1920.
- (f) The Societies Registration Act XXI of 1860.
- (g) The Indian Trustee Act XXVII of 1866.
- (h) The Registration Act XVI of 1908.

The Endowment Act.—

The Religious Endowments Act XX of 1863 specifically makes provisions relating to management of mosque, temple or

¹ The Legislative Assembly Debates (Official Report) 1923 Vol. III p. 3877.

religious establishment as regards right of succession to trusteeship, tenure of office etc.

The Official Trustees Act.—

Under the general Law, in British India, any person desiring to make a trust for charitable or otherwise except religious purpose may appoint under Act II of 1913 the official Trustee with his consent as trustee of the settlement. And the High Court may also appoint the official trustee to take charge of the trust, if no trustee acts or the trustees and beneficiaries are desirous that the official trustee should take over charge of the *waqf*. When the official trustee is appointed by the deed of *waqf*, he can receive remuneration fixed by the deed, and if he is appointed by the High Court, he may receive as his remuneration the commission fixed in s. 11 of the Act.¹

The Charitable Endowments Act.—

Similarly under the Charitable Endowments Act 1890, the Treasurer of Charitable Trusts may be made responsible for applying the income in accordance with the scheme for the administration of the settled property.²

The Civil Procedure Code 1908, Section 92.—

(i) "In the case of any alleged breach of any express or constructive trust created for public purpose of a charitable or religious nature or where the direction of the Court is deemed necessary for the administration of any such trust, the Advocate General, or two or more persons having an interest in the trust and having obtained the consent in writing of the Advocate General may institute a suit whether contentious or not in the principal Civil Court of original jurisdiction or in any Court empowered in that behalf by the Local Government within the local limits of whose jurisdiction the whole or any part of the subject-matter of the trust is situate to obtain a decree.—

(a) removing any trustee;

¹ Vide The official Trustees Act II of 1913, sections 8, 9, 10 and 11.

² Charitable Endowments Act VI of 1890, sections 2-8.

- (b) appointing a new trustee;
- (c) vesting any property in a trustee;
- (d) directing accounts and enquiries;
- (e) declaring what proportion of the trust property or of the interest therein shall be allocated to any particular object of the trust;
- (f) authorising the whole or any part of the trust property to be let, sold, mortgaged or exchanged;
- (g) settling a scheme; or
- (h) granting such further or other relief as the nature of the case may require.

(2) Save as provided by the Religious Endowments Act 1863 no suit claiming any of the reliefs specified in sub-section (1) shall be instituted in respect of any such trust as is therein referred to except in conformity with the provisions of that sub-section.¹

1. Section 92 of the Civil Procedure Code 1908 provides comprehensive rules for enforcement of charitable or religious trusts. Section 92 is substituted for old section 539 of the Civil Procedure Code of 1882 (as amended in 1888).

The following are old cases falling under section 539. The forms of relief mentioned in the section are strictly to be sought otherwise the permission of the Advocate General is not essential as was actually held in the following cases. *Jawahar v. Akbar Hossein* 7 All. 178 (F. B.); *Kazi Hassan v. Sagun Balkrisnua* 24 Bom. 170; (1899) *Muhammad Abdullah Khan v Kallu* 21 All. 187 (1899); *Jamaluddin v. Mujtaba Husain* 25 All. 631 (1903) and *Dasondhay v. Muhammad Abu Nasar* 33 All. 660 (1911).

The Legal Remembrancer or the Collector with the permission of the Local Government may institute the suit, *Muhammad Azizuddin v. The Legal Remembrancer* 15 All 321 (1893).

In *Saiyid Ali v Ali*, Jan. 35 All. 98 (1912) 11 A.L.J.R. 20, the Court observed that in case of a public waqf of a religious or charitable nature the suit for the removal of a mutawalli must lie under section 92 (1) of the Code of Civil Procedure 1908.

The mutawalli is liable to be removed if he has himself purchased the waqf property or unlawfully transferred the same or is guilty of wilful waste or gross neglect or is found to be not a fit and proper person, vide *Joygunnessa Bibi v. Majibullah* 81 I. C. 850 (Cal 1923).

The court will consider the interests of the public for whose benefit the waqf was made. It may vary any rule for general administration of waqf, if so required in the interest of the waqf management. *Mohomed Ismail Ariff v. Ahmed Moola Dawood* 43 I. A. (1916).

Trusts Act XIV of 1920.—

This is an Act to provide more effectual control over the administration of Charitable and Religious Trusts. A suit may be brought against a *mutawalli* who denies the existence of the *waqf* under Sec. 5 (3) of Trusts Act XIV of (1920).¹

The Societies Registration Act.—

Any Muslim society which has for its object the management of a public trust may lawfully be registered under the Societies Registration Act XXI of 1860, *e. g.* a *waqf* of a masjid and property attached to it or of any educational institution may be registered.

The Indian Trustees Act.—

It seems that under the Trustees Act XXVII of 1866 the *mutawalli* may obtain permission for sale and mortgage of *waqf* property by an application only.

The Registration Act.—

A *waqf* in writing may be registered under Section 17 of the Indian Registration Act XVI of 1908, though according to Muslim Law no such formality is required.²

3. The Development of Muslim Law of waqf.

The *waqif endower*, must be an adult (major)³ and sane person, and owner of the property to be dedicated, and the Indian Majority Act IX of 1875 would be applicable, according to which the age of majority is eighteen years and for persons under the Court of Wards it is twenty-one years.

1 If the existence of the *waqf* itself is in dispute or denied by the alleged *mutawalli*, then the case may be brought under sec. 5 (3) of the Charitable and Religious Trusts Act XIV of 1920. *Ali Mohammad v. Collector of Bhagalpur* 101 I.C. 207 (Pat. 1927.)

Under S. 3 any person interested in the trust can petition the Court and obtain an order directing the trustee to furnish particulars and S. 5 prescribes the procedure, and sub-section 3 of S. 5 requires that the trustee should institute within three months a suit for a declaration if he denies the existence of trust and sub-section 4 provides that if no suit is instituted the Court shall itself proceed to decide the question.

2 *Majubunnisa v. Abdur Rahim* 23 All. 288.

The subject of *waqf* is *aqar*, immoveable property. The *waqf* of moveables is not lawful except of arms and beasts of burden, cattle and implements of husbandry as accessories to land, Korans dedicated in Mosques, and also things sanctioned by custom. It is submitted that *waqf* of money and modern forms of investment in joint stock companies and Government securities is also lawful.¹

1 This is an interesting point under Anglo-Muslim Law and in my opinion the Courts should without hesitation hold such 'waqfs' as valid, Ameer Ali takes the same view (vide Mahomedan Law Vol. 1 pp. 176—183) that such 'waqfs' are absolutely valid. He says, "since the date of the Hedaya a 'waqf' of money had come to be expressly recognised" and further, observes, "that under Hanafi Law the 'waqf' of Government securities, shares in companies, debentures and other stock is perfectly lawful and valid." The Durrul Mukhtar translated by Brij Mohan Dayal, p. 343, says "and similarly it is valid to dedicate intentionally any moveable which people usually do dedicate for instance an axe and a hatchet, even dirhams and dinars. I say that Kazis have been ordered (by the Turkish Government) to hold as valid the 'waqf' of coins, as it is to be found in the dispatches of Mufti Abu-Saud," "In the foot notes of this work it is observed, "Opinion as to validity of appropriation of money is attributed in Khulasa to Ansar and in the Khaniah to Imam Zufur. The author of the Menahul Ghaffar says that that inasmuch as the appropriation has become very common in Turkish cities it comes under the dictum of Mohammad as to 'waqf' of moveables"—Ruddul Muhtar Vol: 2 p 410."

There is some conflict in decisions of the Indian High Courts, it seems that some of decisions favour the view that the 'waqf' of money or shares are unlawful. The earliest decision of the Calcutta High Court in Fathima v. Ariff Ismailjee Bham, 9 C. I. R. 66 (1881) is an authority for the negative. then an unreported decision in the affirmative (Sakina Khanum v. Luddun Sahiba Reg. App. 110 of 1900. The latter case was dissented in an elaborate Judgment by Woodroffe J. who attempted to examine original authorities also, Kulsoom Bibee v. Golum Hossein, 10 C W.N 449 (1903) Mr. Ameer Ali in his Student's Handbook observes that the decision in Kulsoom Bibi case is "quite erroneous." The Madras High Court in Kadir Ibrahim Rowther v. Mahomed Rahumad-ulla Rowther 33 Mad, 118 (1909) has held that the right to recover money under a decree cannot be made subject of 'waqf.' However the Allahabad High Court held in the affirmative and expressly dissents from 9. C.L.R. 66 vide Abu Sayid Khan v. Bakir Ali 24 All., 190 (190). Again in Muhammad Ismail v. Muhammad Ishaq (All., 1921) 62. I.C 904 ; 43 All., 508 where a woman had made a will directing the sale proceeds of her property to be utilised for constructing a masjid, the heirs were given an option to retain the property and to erect a masjid of this value. This was held to be a 'waqf' of the value of the property as distinct from the property itself.

Again in Banubi v Narsingrao 31 Bom. 250 (1906) there is a suggestion that moveable property might validly be a subject to waqf vide also Advocate General

The object of *waqf* must be lawful under the Muslim Law. All works for advancement of religion, charity, education and those in the interest of public utility are proper objects and ultimate application must be to objects not liable to become extinct, but if for some proper reasons and change of circumstances it is not possible to apply the *waqf* in the manner directed by the *waqif*, the Kazi (Court) may apply it according to *cypres* doctrine for similar² purposes as near as possible to the objects which failed or for the benefit of the poor. This is the view expressed by Mr. Abdur Rahim Tagore Law lectures 1907 p. 305 and it has received judicial recognition in *Salebhai v. Bai safeabu*. (1917) 36 Bom. 111. "Where the testator has indicated a general charitable intention in the bequest made by him and if these bequests fail, the Court can devote the property to religious charitable purposes according to the *cypres* doctrine."

Under Anglo-Muslim Law the following are not fit and proper objects of *Waqf* by reason of vagueness and uncertainty.

(1) A *waqf* for benefit of mankind.¹

(2) For inhabitants of a city and if they become extinct then ultimately for the poor.

of Bombay v. Yusuf Alli 84 I.C. 659 (Bom. 1924.) which supports this view. The Chief Court of Oudh holds the same view Yaqub Beg v. Rasuf Beg (1922) 74 I.C. 517, on appeal to the Privy Council Rasul v. Yaqub Beg 87 I.C. 702 (P.C. 1924.) no conclusive opinion was expressed on this point.

Finally the words "any property" in sec 2(1) of the Mussulman Waqf Act VI of 1913 are without doubt wide enough to cover all moveable and immoveable property including the present forms of investments into stock and shares etc. As a matter of fact in the original draft of the Bill all these were mentioned, but for some reasons they were dropped. It should also be noted that the words "any property" are somewhat restricted in meaning by the following words of section 3 of the same Act. viz. "It shall be lawful.....to create a waqf which in all other respects is in accordance with the provisions of Mussulman Law."

1 In the leading English case *Morice v. The Bishop of Durham* 10. Ves. 522, Lord Eldon observed, that a bequest "for such objects of benevolence or liberality as the executor should most approve of" was too vague to be enforced, Similarly in *Blair v. Duncan* (1902) A. C. 37, and in *re Macduff* (1896 2 Ch. 463, a trust for charitable philanthropic purposes or such purposes as trustees may think proper is void for uncertainty. The same view has been held by the

(3) That after the death of the *mutawalli* the pious residents of the town would look after the *waqf*¹

The *waqf* is complete according to Imam Muhammad when the *waqif* has delivered possession of the subject of waqf to the *mutawalli*, trustee; but according to Imam Abu Yusuf mere declaration of *waqf* is sufficient to establish it. The Fatwa-i-Alamgiri adopts the view of Imam Muhammad and his opinion has been followed by the High Court of Allahabad, but the High Court of Calcutta has followed the opinion of Imam Abu Yusuf, and which has also been recently adopted by the High Court of Rangoon.² Under the Shia Law *waqf* is not

(1899). The reason is obvious it will be in effect exempting the trustee from judicial control or if the Court is to direct the trustee as to what objects are good purposes, it will be exercising administrative functions and not judicial. Wilson says (Muhammadan Law p 354.) "It is to make the so called 'waqf' in effect a bequest to the State—only that the State is to estimate the goodness of different purposes by a Muhammadan standard. If this is really Muhammadan Law, it is outside the province for that Law in British India." Late Mr. Ameer Ali strongly dissents from this view (Mahommedan Law Vol. 1 p. 325,) and Tyabji also disagrees (Muhammadan Law p. 596.)

The Bombay High Court has held a Waqf by Khoja Muslim to dharm as void for uncertainty vide Gangabai v. Thavar (1863) 1 Bom H C R. 71. And the Punjab Chief Court in Shahab-uddin v. Sohan Lal (1907) Punj. Rec. no. 75. held a Waqf for such charitable objects as the trustees should think proper and which would cause bliss to waqif as void for uncertainty. On the other hand the Allahabad High Court has held in Mukarram v. Anjumanunnissa 45 All. 152 (1923) a waqf for fatiah and umur khair, general charitable purposes, including for maintenance of poor as valid. The Bombay High Court in Advocate General v. Jimbabbhai has interpreted the word khairat, distribution in charity.

1 Muhammad Shafi v. Dost Muhammad 11 A L.J.R., 895 where the 'waqif' provided that after the death of himself and his wife the pious residents of the town, rausai qasba, saiful khair and Ulnai deen Mahommad. Amil bil Hadis, should look after the 'waqf'. The plaintiff alleged that he was elected by such a class as mutawalli. The Court held the persons alleged to have appointed the plaintiff were an undefined uncertain, and fluctuating body of men.....the suit was not maintainable.

2 As regards delivery of possession in Doe dem Jaun Bibi v. Abdulla Barber Fulton 345 (1838) the opinion of Imam Abu Yusuf was preferred, and recently this view was accepted by the Rangoon High Court in Ma E Khin v Maung Sein (1924) 2 Rang. 495 ; 88 I.C. 167. However the Allahabad High Court has followed Imam Muhammad in Muhammad Aziz Uddin v. The legal Remembrancer (1893) 15 All. 421. Vide also Muhammad Yunus v. Muhammad Ishaq 19 A L.J.R 380; 43 All. 487 where the waqif executed a deed of waqf of some land in favour of a school, but possession was not delivered, subsequently he sold his property including this land

complete unless possession of the subject of *waqf* is given either to the *mutawalli* or to the beneficiary.¹

A *waqf* cannot be contingent suspended on any condition,
 Contingent waqf e.g. a person says, "If my son comes, then my
 property will be a *waqf* for the poor.² The same
 is the view of Shia Law.³

As interpreted by the Privy Council and the Indian High
 The law of waqf Courts, it is essential to constitute a valid *waqf*
 prior to waqf Act that the property should be substantially dedicated
 VI of 1913. to charity. The *waqf* is not, however, invalid, simply by reason
 of the fact, that it contains some provisions in favour of the *waqf*
 himself or his descendants, provided it is such, that it may not be
 construed as an aggrandisement for the benefit of the family, which
 would be the case if the *waqf* is not of a public nature or the

to others. Held, there was no valid 'waqf' And again recently in Muhammad Shaffi v. Muhammad Abdul Aziz 49 All 391 (1926), when the waqif constitutes himself the mutawalli, trustee, it is obvious there shall be deemed to be a change of possession, from the waqif to the trustee, though in fact no actual delivery of possession takes place. The Municipal or village records should however show waqif's possession as trustees and no longer as owner of the property. The following cases may be cited, as to evidence of mutation of names in revenue papers vide Abadi Begum v. Bibi Kan iz Zainab (P. C 1927) 6 Pat 259. In Mohammad Zain Khan v Nurul Hasan Khan, the waqif appointed himself as trustee, though there was no mutation yet the waqf was held to be valid. Some other cases are; Abdul Rajak v Jimabai 14 Bom. L. R 295 (1911). Janjira v. Muhammad 49 Cal. 477 (1922) Abdul Jalil v. Abid Ullah 43 All 416. (1922). Tafazzul v. Majid Ullah 5 Lah. 59 (1924).

1 Baillie 11, 212. The Shia Law is strict on the question of delivery of possession vide Thakur Ram v. Saiyed Sadiq, 8, I.C. 1150 (Oudh 1910). [A case of waqif appointing himself as trustee].

2 The declaration of trust cannot be contingent on any uncertain event e. g., the death of the 'waqif' without issue vide Pathukutti v. Avathalakutti 13 Mad., 66, (1888).

3 As regards the Shia Law vide Baillie 11, 218. "If the appropriation is restricted to a particular time or made dependent on some quality of future occurrence it is void. In Syeda Bibi v. Mughal Jan 24, All., 231, (1902), it was stated in deed that it shall come into force from the date of its registration, the 'waqf' was held to be invalid. This view may now be qualified by the decision in Baqar Ali v. Anjumanara Begum 25, All., 236 (1903) over ruling Agha Ali Khan v. Altaf Hasan Khan 14, All., 429 (1903). F. B. containing an elaborate judgment of Mahmood J.

amount set apart for charitable or religious purposes is absolutely insignificant. The ultimate gift must always be to charity, and it should not be too remote or illusory.¹

According to the previous decisions of the Privy Council and the High Courts, the dedication to charity must be substantial, but under the *Waqf* Act VI of 1913 this is not essential, though it is required that the ultimate benefit must expressly or impliedly be reserved for the poor or for some charitable purpose, but the *waqf* will not be impaired by reason of remoteness of benefit to the poor, as was the case under the old law.¹ Thus the doctrine of substantial dedication and invalidity for remoteness of benefit to the poor as expressed in *Abul Fata v. Rasamaya* 22 Cal. 619 (1894) is no longer law for *waqfs* created after 7th March 1913.

Now a Hanafi *waqf* is valid even if the whole income is used for the benefit of the *waqif* himself, vide *Bismilla Begum v. Maharaja of Mahmudabad* 102 I. C. 77 (Oudh 1927), however the ultimate benefit must be for the poor, or for a pious charitable purpose of a permanent nature.

The text of the Mussulman Waqf Act VI of 1913.—*

An Act to declare the rights of Mussulmans to make settlements of property by way of *waqf* in favour of their families, children and decendants.

* After the passing of the 'waqf' Act. VI of 1913, the question of the validity of private 'waqf' family settlements is no longer in dispute, nevertheless the history of the event which led to the passing of this enactment is interesting from a legal and academic point of view. The theory as propounded by the jurists and recently by late Mr Ameer Ali in his work on the Muslim law and in his well known judgments, briefly is to the effect, that the creation of family 'waqf' is of itself a religious and charitable act under the Muslim Law. The cases in favour of private 'waqfs' are: *Doe d Jaun Bibee v. Abdoolah Barber*. Fulton 845 (1838), *Bibee Kaneez Fatime v Bibee Sahiba* Jan 8 W.R. 313 (1867), *Khojah Hossein Ali v. Shahzadee Hazara Begum* 12 W R. 344 (1869) *Muzhurool Haq v. Puhraj Ditarey* 13 W.R. 255 (1870) The cases against creation of private family 'waqf's are:—*Abdul Ganne Kasam v. Hussan Miya Rahimtullah* 10 Bom., H.C. (1873) *Mahomed Hamidullah Khan v. Lutful Haq* 6 Cal., 741 (1881) *Abdul Fata v. Rasamaya* 22 Cal., 619 (1894) affirming on appeal *Rasamaya v. Abdul Fata* 18 Cal., 393 (1890), overruling *Meer Mahomed Israil v. Sashti Churn Ghose* Cal., 214 (1892) and following *Bikani Mia v. Shuk Lal Poddar* 20 Cal., 116. (1892).

Whereas doubts have arisen regarding the validity of *waqf* created by persons professing the Mussulman faith in favour of themselves, their families, children, and descendants, and ultimately

Abdul Fata's case was followed by the Allahabad High Court in *Muhammad v. Munnawar* 21 All., 329 (1899). A reaction had however already set in by the decisions of the Bombay High Court which though condemning 'waqf' as a perpetuity of the worst kind, nevertheless admitted their validity as to settlement in favour of the waqif's descendants, if there be an ultimate dedication to a charitable unfailing purpose, vide *Fatima Bibi v. The advocate General* 6 Bom. 42 (1881); *Amrutlal Kalidas v. Shaik Hussain* 11 Bom, 439 (1887). *Nizamuddin v. Abdul Gafar* 13 Bom, 264 (1888) P.C. It was not until the decision of the Privy Council in *Mujibunnissa v. Abdur Rahim* 23 All., 233 (1900) that the question was free to some extent from doubt. The Privy Council observed, "the theory of the deed seems to be that the creation of family endowment is of itself a religious and meritorious Act.....It is superfluous at the present day to say that this is not the law." The same is in *Muhammad Munawar Ali v. Rasulan Bibi* 27 All. 320 (1900).

However we should note that this judicial interpretation of Muslim Law only applies to 'waqfs' created before the passing of the Mussalman 'waqf' Validating Act VI of 1913. The word "charity" in Muslim Law has a wider meaning than it has under the English Law. It should be admitted that the use of the term is peculiar. Islamic charity consists of any pious act with a view to obtain reward from God.

SOME OLD CASES.

(a) *Abdul Fata v. Rasamaya* 22 Cal. 519 (1894); 22 I.A. 76. Two brothers executed a settlement of all their immoveable property 'for the benefit of our sons and children and the members of our family from generation and in their absence for the benefit of the poor and beggars and orphans. We two brothers take upon ourselves the management and supervision of the same in the capacity of mutawallis for such time as we may live....." In this case it is clear the ultimate trust for the poor is too remote, it is in the nature of an aggrandisement for the benefit of the family. Thus it was held to be void. But now under section 4 of the 'waqf' Act VI of 1913 such a 'waqf' would be perfectly a valid 'waqf'.

(b) *Muzhurool Huq's v. Puhraj Dittarey* 13 W.R. 255 (1870). A Muslim conveyed certain property to a mutawalli for the purpose of supporting a Mosque, to feed travellers, to give alms to mendicants, to educate the poor, and the remaining profits to defray expenses of the marriages, burials, and circumcision of the members of the family of the first mutawalli. This was held to be a valid 'waqf' and it is obviously also valid under the 'waqf' Act VI of 1913.

(c) *Mahomed Ahsanullah v. Amarchand Khandu* 17 Cal. 498 (1899) 17 I. A. 28. A Muslim executed a deed dedicating his whole property for certain religious purposes 'fisabilillah' defraying expenses of a Masjid, and schools, "in the manner mentioned below," and he made minute provision for the succession of his sons and other descendants to the office of mutawalli, and for the maintenance and

for the benefit of the poor or for other religious, pious, or charitable purposes; and whereas it is expedient to remove such doubt; It is hereby enacted as follows :—

1. (1) This act may be called the Mussulman *Wakf* Validating Act 1913.

(2) It extends to be whole of British India.

2. In this Act unless there is anything repugnant in the subject or context.

(1) *wakf* means the permanent dedication by a person professing the Mussulman faith of any property for any purpose recognised by the Mussulman law as religious, pious or charitable,

(2) "Hanafi Mussulman" means a follower of the Mussulman faith who conforms to the tenets and doctrines of the Hanafi School of Mussulman Law.

3. It shall be lawful for any person professing the Mussulman faith to create a *wakf* which in all other respects is in accordance with the provisions of Mussulman Law for the following among other purposes.

Power of Mussulmans to create certain waqfs.

(a) for the maintenance and support wholly or partially of his family, children or descendants, and

(b) Where the person creating a *wakf* is a Hanafi Mussulman, also for his own maintenance and support during his life-time or

support of his family with the power to the trustees to increase their own allowances and those of the family. And the deed contained no direction as to the application of the remaining income which would be left over in case of total failure of the waqif's descendants. It was held to be an invalid 'waqf' being in the nature of family aggrandisement, the gift to charity being illusory by reason of smallness of the amount.

(d) *Mutu Ramanandan v. Yava Levvai Marakayar* 34 Mad. 12 (1910) confirmed on appeal by the Privy Council 40 Mad. 116 (1916) 44 I. A. 21.

Two Muslim executed a 'waqf' of their properties of the value of Rs. 20,000 in trust to apply an indeterminate (variable) portion for the performance of fatiah and to alms, the residue of the income for the benefit of the 'waqif's' sons and descendants. The amount acquired for fatiah etc. was estimated to be about Rs. 600 per year and the balance for the benefit of the family was about Rs. 900. The 'waqf' was held to be valid. Their Lordships observed, "These figures may vary They are not fixed and unalterable. The income may fluctuate or decrease permanently. The paramount purpose of the grantors was evidently to provide for all the needs of those charities. It is the residue, which may be a dwindling sum that is given to the family."

for the payment of his debts out of the rents and profits of the property dedicated.

provided that the ultimate benefit is in such cases expressly or impliedly reserved for the poor or for any other purpose recognised by Muhammadan Law as a religious, pious, or charitable purpose of a permanent character.

3. No such *wakf* shall be deemed to be invalid merely because the benefit reserved therein for the poor or other

Wakfs not to be invalid by reason of remoteness of benefit to poor etc.

religious, pious, or charitable purpose of a permanent nature is postponed until after the extinction of the family, children, or descendants of the person creating the *wakf*.

5. Nothing in this Act shall affect any custom or usage

Saving of local and sectarian custom,

whether local or prevalent among Mussulmans of any *particular class or sect*.

The Mussulman *wakf* validating Act VI of 1913 has been held not to be retrospective.¹ And it does not apply to *Sunnis* of other sects *viz.* of the *Shafi*, *Maliki*, or *Hambali* School of Muslim Law nor does it apply to *Shia* Muslims.

Life interest:—

A Hanafi Muslim can reserve a life interest for himself under the *waqf* deed, and he may also provide for payments of his debts from the income of the *Waqf* property.

According to the *Shia* Law if the *Waqf* reserves the whole income, the *waqf* is absolutely void, and if he reserves a part of the income for himself, the *Waqf* is invalid as to that part and valid as to the rest.²

A *Shia* Muslim may however create a life interest in favour of another person.³

1 Amir Bibi v Aziza Bibi 39 Bom 563 (1914) (Held not to be retrospective). Vide also Mutu Ramanandan v Vava Levvai Marakayar 34 Mad. 12 (1910) confirmed on appeal by the Privy Council 49 Mal. 116 (1916), 44 I.A. A 21. And vide Solehman Qadir v. Salimullah (P. C. 1922) I. C. 138. It has been held that it does not apply to a 'waqf' held to be invalid in a previous adjudication, Mahomed Bukah v. Deawan Aiman 43 Cal. 158 (1915).

2 It is essential that a Shia Muslim must divest himself completely of ownership from the time of creation of 'waqf;' vide Ali Raza v. Sanwal Das 41 All., 34 (1919). As to validity of 'waqf' partly valid partly invalid vide Haji Kalub v. Mehrum Bibi 4 N.W.P. 155 (1872). Hamid Ali v. Mujawar Hussain 24 All 257.

3 As to the life interest in favour of the wife, vide Muhammad Ahsan v. Umardraz 28 All. 633 (1906).

Under Anglo-Muslim Law the maintenance of a tomb of an individual and performance of *fatiah* for the benefit of his soul is not a proper object of *waqf* and the rule against perpetuities would invalidate such a dedication. However it has been held that performance of *fatiah* if the expenditure of money is for feeding the poor is lawful. It is valid to make a *waqf* for the maintenance of the tomb of a recognised saint. In *Khaleeloola v. Nuseer udeen* 18 Mad., 201 (1894) it was observed that building of tombs and reading Koran at a tomb were not approved of by the Muslim Law the view taken by the court was that it creates a perpetuity of the most useless description which would certainly be invalid under English Law.¹

A Muslim, lawful owner of some property may dedicate for purposes of offering prayers, and similarly property may be dedicated for the requirements or otherwise to the *masjid*, and which would be treated on the same footing as the *waqf* of the *masjid* itself.

The *waqf* of the *masjid* is completed by the offer of prayer openly by the Muslims in a body, and according to some jurists

¹ The case bears a close analogy to one in which a Roman Catholic had devised property for masses for the death, which has been held to be invalid in India on grounds of public policy irrespective of any territorial law, *Colgan v. The Administrator General of Madras* 15 Mad., 424 (1892). The Privy Council also has held a similar bequest in a will as invalid vide *Yeaq Cheah Neo v. Ong Cheag Neo* L. R. 6 P. C. 381 (1875) (An appeal from the Strait Settlements). However it may be noted that 'urs,' anniversary ceremony, and 'fatiah' are valid objects if their performance entails the feeding of the poor, vide also *Salebhai Abdul Kader v. Bai Saifiabu* 36 Bom. 111 (1911).

In *Biba Jan v. Kalb Husain* 6 A.L. J.R., 115 (1909), where a Muslim Lady had made a 'waqf' for the following purposes, the celebration of the birth of Ali, expenses for keeping tazias in Muharram, for repairs of Imambaras and for celebrating the death anniversaries of dead persons it was held to be valid.

In *Fakhruddin v. Kifayat Ullah* 7 A.L. J.R., (1095) Karamat Husain J. examined several authorities from a very strict orthodox point of view and some of his remarks are as follows; "The *fatiah* and *urs* ceremonies in their popular sense are neither religious nor charitable in the sense of a charity for the benefit of the poor which they may claim as a matter of right. It therefore follows that a 'waqf' for the *fatiah* or *urs* ceremonies in their popular sense cannot be a valid *waqf* (1097)". This case was expressly dissented from by the Bombay High Court in *Azim-un-nissa v. Sirdar Ali* 29 Bom. L. R. 434, 102 I. C. 129.

even by the offering of a prayer by the Imam previously appointed by the *waqif*, through such an *Imam* may also happen to have the duty of *mua'zin*, call bearer, assigned to him.

The administration of the *masjid* is usually done under the supervision of the Kazi, Court, by the *mutawalli* or by a body of the Muslims interested in the *masjid*.

A *masjid* is a place of worship and as such every Muslim is entitled to enter it for purposes of performing his devotions according to the ritual of his own school, and he is entitled to join in the congregational prayers, which are being offered in the *masjid* in the manner sanctioned by the Muslim Law. The differences in the rituals of the four important *Sunni* schools *viz.*, the *Hanafi*, *Shafi*, *Malaki* and *Hambali*, are not such as to prevent followers of one school from taking part in the congregational service of the other sect.²

Under Anglo-Muslim Law if a *masjid* is dedicated exclusively for the worship of a particular sect, the dedication of the building as *masjid* is valid, but the reservation is void, however it seem that a

1 In *Queen Empress v. Ramzan* 7 All., 461 (1885) Mahmood J. based his dissentient Judgment upon mixed considerations of the meaning of his Indian Penal Code and the Muslim Ecclesiastical Law, and his observations were followed in *Ataullah v. Azimullah* 12 All., 494 (1889); *Jangu v. Ahmadullah* 12 All., 418 (1889).

2 The Hanafi practice is to say the word "amin" in a low soft voice absolutely inaudible and the Shaffi practice is to say the same words "amin" in a loud tone. It has been held in the above cases that this fact should create no annoyance to others if it is done simply with the intention of performing a religious obligation and not maliciously. The Privy Council has upheld this view in *Fazal Karim v. Maula Bukash* 13 Cal., 448 (1891). In this case the Imam who conducted the prayers himself adopted the Shafi rituals, and the Hanafis were said to have no cause to complain. In my opinion it is a doubtful decision if the *masjid* was built by the Hanafis it was rather unfair for the Imam to adopt the Shafi rituals, the trustees of the *masjid* if any should have appointed another Imam, to conduct the prayers. There is some difference in allowing members of the service observing rituals of another school to join in prayers and in permitting the Imam to adopt rituals of a different school. The latter change is of a very drastic order. Some support for this view is to be found in the decision of the Patna High Court in *Hakim Khalil Ahmad v. Malik Israfi* 2 Part L. J. 108 (1916) where dissenting Muslims the Kadianis through entitled to enter a mosque were held not entitled to pray behind an Imam of their own choice, since the *masjid* was always used by the Hanafi Muslims,

reservation for any community in the body of trustees for having constructed the *masjid* is lawful.¹

In case of a mortgaged property it is lawful to make *Waqf* before redeeming it, provided it is later on actually redeemed or the *Waqif* dies leaving sufficient assests to redeem it; but if he were to die leaving inadequate amount for purpose of redemption, then the property may be sold and the *waqf* would be void. In *Shahazadee Hazara Begum v. Khaja Hussein* 12 W.R. (Sutherland) 498, it was held by the Court, "if the mortgagor endows the land and dies previously to redemption leaving sufficient assets, the heirs are bound to apply those assets to the redemption of the mortgage." And now under section 3 (b) of the *waqf* Act 1913 it would obviously be lawful to make *waqf* and pay the mortgage money from the income of the property dedicated *vide Jinjira Khatun v. M. Fakhirulla* 49 Cal. 477 (1922).

It seems that under Anglo-Muslim Law, a *waqf* created with a view to delay or defeat the rights of creditors may be avoided by any creditor so delayed or affected.

§ 4. Administration of *waqf*.*

(i) The administration and management of the *waqf* property is duly vested in one or more *mutawallis*, trustees, who are usually nominated by the *waqif*.²

¹ A mosque is any dedicated place there need be no "minaretj" vide, *Maula Buksh v. Ammiruddin* 1 Lah, 317 (1919) and the condition in favour of exclusive use of one sect is void, *ibid*, 1 Lah., 317.

In *Ibrahim Esmael v. Abdool Currim*. 35 I.A. 181 (P.C. 1908) Masjid founded by all Muslims and was taken up exclusively by Cutchi Muslims, subsequently it was restored to all Muslims non-Cutchi as well as Cntch Muslims.

In *Fazal Rahman v. Oulam Hossain* 761 C. 788 (Rang 1923) a Masjid was built by the Bengalis and they were given majority in the body of trustees.

* For a full discussion vide 'A Digest of Anglo-Muslim Law' by the present author pp. 153—160.

² The *mutawalli* is considered as a manager of the *waqf* property, its ownership, is vested in God.

In *Rustam Ali Khan v, Mushtaq Husein* 42 All. 609 ; 47. I. A. 224 (1920), The Privy Cuncil held that the matawalli has no estate or interest in the *waqf* property, and as it does not transfer property to the *mutawalli*, the *waqf* deed requires no regiseration. Vide also *Narain Das v. Haji Abdur Rahim* (1919) 47 Cal. 866. *Vidya v. Bulusami* 48 I.A. 802 (1911), 44. Mad. 831.

(b) A non-Muslim could also be appointed as *mutawalli*, but if the *waqf* involves performance of some religious ceremony or duties (e.g. that of *Imam* in a *masjid*) then neither a non-Muslim nor a woman could be appointed to act as *mutawalli*.

(i) The *mutawalli* is entitled to do all reasonable acts justifiable and proper for the maintenance, protection and administration of the *waqf* property.¹

(ii) For payment of taxes or for necessary repairs when no income is available for this purpose, the *mutawalli* may if empowered by the *waqf* deed, if not with the permission of the Court contract debts, or mortgage the property² or its produce, and he may even sell³ a part of the *waqf* property for the same

There may be one or more trustees vide *Mahomed Ghaous Siddikh v Sheik Moideen Siddikh* 29 I. C. 849 (Mad 1915.)

The temporary withdrawal of the *mutawalli* from office and his entrustment of the work to another does not legally affect his own ultimate responsibility, *Ali Hussain v. Muhammad Hussain* 52 I. C. 628 (All. 1919).

Thus the *mutawalli* may validly appoint a deputy for collecting rents and proceeds of the *waqf* property. *Khajeh Salmullah v. Abul Khair* 37 Cal, 263. *Wahid Ali v Ashruff Hussain* 8 Cal, 732 (1882) *Sultan Ahmad v. Abdul Gani* 46 Cal., 10 (1919).

Wahid Ali v. Ashraff Hussain (1882) 8 Cal. 732 (agent appointed); *Mahooddin Ahmed v. Elahee Baksh* 6 W. R. 277 (1866) (authority lapses).

¹ Repairs are a first charge on the income. Vide *Moulvie Abdoolah v. Mussammat Rajesri Dossea* (1846) 7 S. D. A. 268.

² Apparently in *Niami Chand v. Golam Hussein* 37 Cal. 179 (1909) the Court went further and confirmed retrospectively a mortgage made under urgent necessity without its previous sanction. It is submitted that the permission of the Court should be obtained beforehand and not after the transaction. The authorities cited in 37 Cal. 179 conclusively favour this view.

³ As regards sale of the *waqf* property in *Shama Churn Roy v. Abdul Kabeer* (1898) 3 C. W. N. 158, the sale was held to be void, and in *Dayal Chand Mullick v. Keramat Ali* (1871) 16 W. R. 116, the *mutawalli* was removed for unlawful transfer.

The application for obtaining permission for sale should be by a regular suit vide in re *Halima Khatun* 37 Cal 870 (1910). But according to later decisions an application would suffice, *Fakhrunnissa v. District Judge* 47 Cal, 592 (1909) *Habibar Kahman v. Saidunnissa* 51 Cal. 331, 771. I C. 940. [These applications were for grant of leases] If some money is advanced for any other than legitimate and proper purpose and needs of the *waqf*, property is not chargeable at all, vide *Abdur Rahim v. Narayan Das* 71 I. C. 646 (P. C. 1923). But it is not for the vendee to see that the *mutawalli* has wisely exercised his discretion to sell the property vide *Gulam Ali v. Sewlatoonnissa* (1864) W. R. 242.

purpose. However no part of the property can be transferred for any other purpose, unless the removal of the thing sold is itself beneficial to the rest of the property, but the annual growth may always be disposed of, for it will be replaced in due course.

(iii) A *mutawalli* is not entitled to lease the *waqf* property in case of lands for a term exceeding three years, and with regard to leases of buildings for a year only ; but if specially empowered or with the permission of the Kazi, Court, the period of lease may be for a longer period.¹

(iv) The Mutawalli may with the permission of the Kazi, Court, increases² the allowances of persons required for the administration or for discharging the duties imposed by the *waqf*, if suitable persons cannot be engaged on the salaries fixed by the deed of *waqf*.

(vi) A *mutawalli* can sue a *co-mutawalli* to restrain him from washing or transferring the *waqf* property.³

(v) The *mutawalli* may erect buildings on the *waqf* land or cultivate it, if it is beneficial to the *waqf* property, he may remove the part in ruins or injurious to the property.⁴

The *mutawalli* has no proprietary interest in the *waqf* property therefore the *waqf* cannot be attached or sold in execution of a personal decree against the *mutawalli*, but the remuneration due to the *mutawalli* may be lawfully attached.

1 As regards leases vide *Darymple v. Kaoondkar* S. D. A. 586 (1885), [A perpetual lease was upheld but here the property leased was not all *waqf*—a heritable estate burdened with certain trusts] In *Sheojat Ali v. Zumeerooddeen* (1866) 3 W. R, 158. A lease in perpetuity at a fixed rent was held to be void. According to the doctrine of *factum valet* an improper lease may be held valid, vide *Golam Muhammad v Akhoy Kumar* 32 I. C. 205 (Cal 1915).

Under the Hanafi Law a *mutawalli* is held liable if he lets the property at an inadequate rent vide *Baillie, Digest* 597. *Ameer Ali Mahomedan Law* Vol. 1 379.

2 Vide *Ameer Ali*. Vol. 1.372.

3 *Ali Hussain v. Muhammad Hussain* 52, I C. 628 (All. 1919.)

4 *Baillie, Digest* 595 "Trees in a vineyard cannot lawfully be sold when the fruit of the vines is not injured by their shade, and though it should be injured by their shade, they cannot be sold, if their fruit is more profitable than that of the vines, but if it be less profitable the trees may be cut down and sold. Trees which are not fruit bearing may also be cut down and sold whenever their shade is injurious to the fruit of the vineyard but not otherwise. But trees that shoot out of second or third time may be cut and sold, for they are like corn and fruit."

Similarly the office of the *mutawalli* cannot be attached, the rents and profits also cannot be attached.¹

The Court besides sanctioning and approving of various acts to be done by the *mutawalli* may also take certain disciplinary action against the *mutawalli*. The *mutawalli* may be deprived wholly or partly of his remuneration or he may be ordered to file an account of his administration of the *waqf* property,² and can be held liable for any pecuniary advantage which he might have acquired in the capacity of *mutawalli*.

The Court, is only entitled to remove a *mutawalli* on proof of misfeasance or breach of trust or if it is ascertained that he is not a fit and proper person to hold this office.

The *mutawalli* is entitled to some reasonable remuneration whether he be himself the *waqif* or not. The remuneration may be the residue of the income of the *waqf* property after meeting all necessary expenses on purposes specified in the deed of *waqf*, or it may be a reasonable not excessive amount fixed by the *waqif* himself. However if no remuneration has been provided for the *mutawalli* in the deed of *waqf*, then the (Kazi), Court, may fix a sum not exceeding one-tenth of the income of the whole property, and similarly if the remuneration fixed by the *waqif* is inadequate then the Court may increase it to one-tenth of the whole income.³

1 *Bishen Chand v Nadir Hussain* 15 Cal., 329, 15 I. A. (1887, the Privy Council observed that the corpus of the estate cannot be touched nor can any specific portion of the corpus of the estate be held liable.

It is self evident that the office of *mutawalli* is not saleable chiefly on grounds of public policy, See *Sarkum Abu Torab v. Rahman Bukash* 24 Cal, 83 (1897)

As to rents and profits vide *Shah Mahomed Naim v Muhammad Shamsuddin* 2 Luck 109 (Oudh 1926).

2 *Imdad Hossein v. Mahomed Ali* 23 W. R. 150 (ordered to give regular account) *Mahomed Ismail Ariff v Moola Dawood* 13 Cal. 1085 (1916)-

3 The fixed remuneration may amount to one-third of the income of the *waqf* property, vide *Jugatmoni Chodrani v. Romjani Bibee* 10 Cal. 538. *Sayid Ismail v. Hamedi Begum* 6 Pat. L.J. 218 (1921) (The residue), As to one-tenth and customary allowance vide *Mohiuddin v. Sayuddin* 20 Cal. 810 (1893).

In *Ramanandan Chettiar v Vava Leva Levai* 40 Mad 116 (p. 122) the Court treated the petty salaries of *mutawallis* as remuneration for their trouble and as a part of the expenditure on the charitable objects.

The Wakf Act No. XLII of 1923.—¹

This is an Act, to make provision for the better management of *waqf* property and for ensuring the keeping and publication of proper accounts in respect of such properties.

Section 3 of the *Waqf* Act No. XLII of 1923 make it obligatory on the *mutawalli* to furnish particulars relating to the *waqf*. Sections 5 and 6 provide about the statement of accounts and auditing of accounts, and Section 10 prescribes fine which may extend to five hundred rupees, in the case of a second or subsequent offence it may extend to two thousand rupees.

In *Nasarullah v. Wajid Ali* 1932 A.L.J.R. 262 it was held that "Where a *mutawalli* complies with the provisions of Sec. 3 Mussalman *Waqf* Act (XLII of 1923), no question as to whether he desires the *waqf* or admits it can arise, because by his conduct in furnishing particulars of the *waqf* he must be deemed to have admitted the *waqf* and his own position, as a *Mutawalli*, and having furnished particulars required by Sec. 3, he is also under an obligation to file a statement of account in terms of Section 5 and if he omits to do so, he can be punished under. Sec. 10. *Vide* also *Affal Husain v. Mohammad Hasan* 1932 A.L.J.R. 266 (a case on the same point.)

¹ for Statement of Objects and Reasons, 'see' Gazette of India, 1921, Pt V p. 182, and for Report of Select Committee, see, 'ibid' 1923, Pt. V. p. 139.

CHAPTER X

§ 1. HIBA—GIFT

The Muslim Law of *Hiba* is expressly recognised in the Punjab, in the North-West Provinces (now the Province of Agra in the United Provinces of Agra and Oudh), in Oudh, and in the Central Provinces. It is treated as an integral part of the Muslim Law in Bengal, in the Madras Presidency and in other parts of British India.¹ The Transfer of Property Act 1882 section 129 declares that nothing on the Chapter on Gifts shall be deemed to affect any rule of Muhammadan Law.

Hiba, gift, is a voluntary transfer of ownership in some specific *Hiba*, property without any exchange. The acts essential for the validity of *hiba* are “tender, acceptance, and seisin.”

(i) The donor must be capable of making the transfer, that is, he must be adult, of sound judgment, and the owner² of the thing given. The Indian Majority Act IX of 1875 would be applicable according to which the age of majority is eighteen years, and for persons under the Court of Wards it is twenty-one years.

(ii) A donation is complete by the offer of the donor and its acceptance by the donee.

(iii) The gift should be accompanied by the delivery of possession actual or constructive.

Writing is not necessary to the validity of a gift.

The Muslim Law of *Hiba* has been greatly affected by judicial decisions as will be seen from the following considerations.

1 The Punjab Laws Act IV of 1872 s. 5 as amended by Act XII of 1878 and the North-Western Frontier Reg VII of 1901. The Oudh Laws Act XVIII s. 3. The Central Provinces Laws Act 1875 s. 5.

Zahoroodeen v. Baharoola 6 W. R. (1864). Shumsoonissa v. Zohra 6 N. W. 2 (1873). Khader Husain v. Husini Begum 5 Mad. H. C. 114 (1870): Vide also Chekonekutti v. Ahmad 10 Mad. 196 (1886).

2 Where the subject of gift is in possession of the agent of the donor or a trustee etc., their custody is considered as the custody of the donor.

§ 2. *Judicial Development.*

(i) The donee must take actual possession of a thing susceptible of physical possession. The possession required to be given must be such as the nature of the property admits of the possession of the property in the occupation of tenants may be delivered by allowing the donee to realise rents and profits, or by requesting the tenants to attorn to the donee *vide Muhammad Hamid Ullah v. M. Majid Ullah* 40 I.C. 374 (1917) *Shaik Ibrahim v. Shaih Suleman* (1884) 9 Bom. 146; *Bibi Khaver v. Bibi Rukhia* (1905) 29 Bom. 468. *Khajooroonissa v. Rowshan jehan* (1876) 2 Cal. 184, 3 I.A. 291 and *vide Mullick A. Gafoor v. Mullka* 10 Cal. 1112 where the question is fully discussed. In this case Garth. C. J. observed, "What is usually called possession in this country is not actual or *khas* possession but the receipt of rent and profit, and if lands let on lease could not be made the subject matter of a gift, many thousands of gifts which have been made over and over again of *Zemindari* property would be invalidated. If we were disposed to agree with this novel view of Mohammedan Law (which we are not), we think, we should be doing a great wrong to the Mohammedan community, by placing them under disabilities with regard to transfer of property which they have never hitherto experienced in this country."

And registration is not a valid substitute for the delivery of property, nor is it essential for the validity of *hiba* but it is helpful in establishing the factum of donation of property.¹

¹ As regards registration *vide Mogulsha v. Moh omed Saheb* 11 Bom. 517 (1887) though there is no saving clause in the Registration Act 1908, and s. 17 of this Act requires "instrument of gift of immoveable property" to be registered nevertheless under Anglo-Muslim Law registration is not necessary, though registration is not a valid substitute but it affords the clearest possible evidence of intention to make a valid gift, where the fact of delivery is somewhat ambiguous, *vide Ismail v. Ramji* 23 Bom. 682, (1899),

But a registered-deed would be void for want of delivery of possession, *vide Sadik Husain v. Hashim Ali* 43 I. A. 212 (1916).

An invalid deed under Section 123 of the Transfer of property Act IV of 1882 because of a defect in attestation would nevertheless be valid if it satisfies the requirements of the Muslim Law, *vide Karam Iiahi v. Sharf-ud-din* 38 All. 212 (1916).

No physical entry is required if the donor and the donee are residing in the house which is the subject of gift, some overt act by the donor indicating an intention to transfer possession is quite sufficient. That is no formal transfer is necessary (a) in the case of a gift by father to his minor son¹ ; (b) in the case of a gift to a bailee, lessee, pledgee or mortgagee² (c) as between the husband and wife.³

(ii) Where the subject of gift is incorporeal property or an actionable claim the gift is complete by an act of the donor indicating an intention on his part to divest himself *in pæsent* of the property and to confer it upon the donee.⁴ Debts negotiable instruments and Government Promissory notes are all choses in action. A gift of Government Promissory notes is completed by endorse-

Similarly it has been held recently by the Calcutta High Court *Nasib Ali v. Wajid Ali*. 100 I. C. 296 (Cal 1926) that a deed of gift requires no registration, but the Lahore High Court has held that it requires registration, vide *Maula Bux v. Hafiz-ud-din*. 94 I.C. 7 (Lah, 1926).

As regards moveable property its registration is optional under Section 8(f) of the Registration Act 1908.

1 In the case of an infant son the declaration of gift is considered sufficient to change the possession of the father on his own behalf into that of the lawful guardian of the minor, vide *Wajeed Ali v. Abdul Ali* W. R. 1864, 127 ; *Husain v. Shaikh Mirza* 13 Mad, 46 (1889). *Ameeroonissa Khatoon v. Abedoonissa* 15 B. L. R. 67. 2 I. A. 87 (1875) *Fatima Bibee v. Ahmad Baksh* 31 Cal. 319 (1903) ; *Fakir Mynor M. Rowthar v. R. K. Vandan* 35 Mad 120 (1912) *Fateh Mahomed v. Mihta* 92 I. C. (Lah. 1925).

2 But a servant or an agent for the collection of rent cannot be said to be in possession like a bailee or lessee. Vide *Valayet Hossain v. Maniram* 5 C. L. R. 91 (1876).

3 As between husband and wife, *Bee Jan Bee v. Fatima Beebee* (1910) 8 I. C. 431. A case of joint residence, vide *Amina Bibi v. Khatija Bibi* (1864) 1 Bom. H. C. 157, *Azim-un-nisa v. Dale* (1868) 6 Mad. H. C. 455 where property let out to tenants, *Emnabai v. Hajerobai* (1888) 13 Bam. 352.

In *Anwari Begam v. Nizamuddin Shah* 21 All. 165 (1896). The Court observed, " There is in our judgment, nothing in the Muhammadan Law to prevent the gift of a right to property. The donor, must so far as it is possible for him, transfer to the donee that which he gives, namely, such right as he himself has ; but this does not imply that, where a right to property forms the subject of a gift, the gift will be invalid unless the donor transfers what he himself does not possess, namely the corpus of the property. He must evidence the reality of the gift by divesting himself so far as he can, of the whole of what he gives."

In *Yacoob Saheb v. Pacha Bibi* 38 I.C. 248 (Mad. 1915) a case of the assignment of an Insurance Policy, unaccompanied by delivery of the document, by the execution of the assignment, and its intimation to the company were held sufficient to vest the property in the donee. It is only fair to admit that the modern notion of choses in action and its transfer was unknown to the Muslim jurists.

Life-estate.

In a recent case *Amjad Khan v. Ashraf Khan* 4 Luck. 305 (1929), 87 I. C. 445 (Oudh 1924) Wazir Hasan J. after citing various authorities in original Arabic came to the conclusion that life estate is fully recognised by the Muslim Law and could be created by way of hiba while Ashworth J. took the contrary view. On appeal to the Privy Council (1929, A. L. J., R. 521,) this matter appears to have been again not clearly decided, but in their Lordship's opinion it is possible to create a life interest

In *Mohammad Siddiq Khan v. Risaldar Khan* 95 I. C. 220 (Oudh 1926) a grant to an illegitimate son by way of life interest was held valid as an ariat and not as a gift.

Tybaji has argued at length in favour of creation of life estate under the Muslim Law. He has closely examined all important decisions 'viz.,' *Humeeda v. Budulun* 17 W. R. 525 (P. C.) ; *Suleman Iadr v. Dorab Ali Khan* 8 Cal. 1 (1881), *Nizamuddin v. Abdul Gafur* 13 Bom. 264, 275 (1888); *Abdul Karim v. Abdul Qayum* 28 All. 342 ; *Abdullah v. Mahomed* 7 Bom. L. R. 306. *Mahomed Shah v. Official Trustee of Bengal* 36 Cal. 431 (1909). And he comes to the conclusion (2nd Ed. p. 502), " That there is no distinct or binding pronouncement by the Privy Council.

ANGLO-MUSLIM LAW

If a person says that this house is thy *raqba* or *habs* and delivers possession of it to the donee, then according to Imam Abu Hanifa and Imam Muhammad it is a case of *ariat* only.

It is submitted that strictly speaking under the Muslim Law life estate can only be created by means of *ariat* and not by way of *hiba*.

Under the *Shia* Law the creation of life-estate is allowed,¹ and it is allowed under the *Shafi Law*, as administered in British India.

Under the *Shia* Law the donor may limit the interest of the donee in the subject of the grant to his own lifetime or the grantee's life. This is called '*Umra*'. Where the grant consist of a right of residence only it is called *sukna*, and where it is limited to a specified time it is called *raqba*.

Similarly the grant after the grantee's lifetime may be vested in the descendants of the grantee and finally it will revert to the donor or his heirs.

Under Anglo-Muslim Law when a gift is made of the corpus and the donor stipulates a right to the income from the property during his life, or that the donee undertakes to do some thing in return, the gift and the undertaking may form valid consideration for each other and the Court may enforce such an agreement as raising a trust for the benefit of the donor.

Gift, Trust

This is according to the view adopted by the Privy Council in *Nawab Umjad Ali v. Mumtaz Begum* 11 Moo. I. A. 517 (1867). The facts were that the Nawab of Oudh made a gift to his son of Government promissory notes with the condition that the donee should during the lifetime of the Nawab make over to

A bench of any of the High Courts in India would be free to examine the text for itself and to give effect to the Law as it may consider it to be. Nor is there any decision of the Madras or Allahabad High Courts which would, hamper the exercise of a similar discretion even by a single judge."

1 In *Banoo Begum v. Mir Abed Ali* 32 Bom. 172 (1907) the Court held, "It is possible for a Mahomedan to create a definite interest like what would be called in English Law a vested remainder, and such a remainder, though liable to be displaced, is not a mere expectancy in succession by survivorship or other merely contingent or possible right or interest but an interest that could be attached or sold."

him the interest accruing on the notes. It was contended before the Privy Council that the gift was invalid. The actual question was not about the reservation inasmuch as the dispute arose after the death of the Nawab, but their Lordships went further and observed that "as this agreement between the father and the son is founded on a valid consideration, the son's undertaking is valid, and could be enforced against him, in the Courts of India as agreement raising a trust and constituting a valid obligation to make a return of the proceeds during the time stipulated." Therefore in this case the Privy Council considers the produce of the subject of the gift as distinct, the income was treated as *iwaz*, but under the Hanafi Law *iwaz* cannot be valid if it is a part of the original gift. Under the Shia Law a portion of the gift may be given as '*iwaz*, and the parties in this case were Shias, but the decision of the Privy Council did not purport to rest on any distinctive feature of the Shia Law. In *Mohammad v. Fakhr Jahan* 49 1. A. 195 (1922) ; 44 All. 301, the parties were Sunnis and the same rule was applied. This principle has been further extended to apply to payment being made to person or persons nominated by the donor during the lifetime of such persons, *Vide Lali Jan v. Muhammad* (1912) 34 All. 478 where the donor directed payment to his grandson during his lifetime. *Vide also Tavakalbhai v. Imatiyaj Begam* 1916) 41 Bom. 372.

Under Anglo-Muslim Law a gift can be effected by means of a trust, and the same requisites are essential as in the case of *hiba*. Here the gift is to be accepted by the trustees and possession must be taken by them. *Vide Sadik Husain v. Hashim Ali*. 38 All. 627, 43. I. A. 212. (6916), the Court observed. "Their Lordships cannot have adopted such a narrow construction of the term gift as would exclude any gift where the donor's bounty passes to his intended beneficiary through the medium of a trust."

According to Anglo-Muslim Law a Muslim mortgagor may make a valid gift of his equity of redemption, and it is immaterial whether he is in possession of the property or not, for in the latter case it would be considered as the transfer of an incorporeal right, in other words the transfer

Equity of redemption.

being such as the subject of gift is capable of. The decisions of the Indian High Courts are conflicting.¹

If an insolvent Muslim makes a gift with intent to defraud defeat, or delay his creditors, it would be voidable
 Gift by insolvent at the option of the person so defrauded. The Calcutta High Court in *Abdul Haya v. Mir M. Mozaffar* 10 Cal. 616. (1884) held, "if the *hibas* are found upon proper evidence to be a contrivance to defraud creditors, they will not stand in the way of the decree-holders executing their decree against the properties mentioned in the *hibas*. The statute 13 Elizabeth C. 5 which was enacted for the purpose of rendering conveyances in fraud of creditors void, is considered to be in affirmances of the general principles of the law by which fraudulent transactions are liable to be vacated at the instance of those affected by the fraud. The statute has been universally applied within the territorial jurisdiction of this Court on its original side ; and whether it has or has not been applied by name in the *mofussil*, the principle on which it is founded has been frequently asserted there, and is in accordance both with Hindu and Muhammadan Law."

1 The Bombay High Court has held that the gift of equity of redemption is not valid if the mortgagee is in possession of the property at the time of the gift. There is an obiter dicta to this effect in *Mohinuddin v. Manchar Shah* 6 Bom. 650 (1882) and it was directly reaffirmed in *Ismail v. Ramji* 23 Bom. 682. However in *Hashimbi Yakub Sahebv. Ajamatbi* 83 I.C. 208 (Bom. 1924) held the gift of an equity of redemption valid where the donee redeemed it afterwards. The Allahabad High Court in *Rahim Baksh v. Muhammad Husain* 11 All. I (1888) per Mahmood J. had expressly dissented from the view expressed in *Mohinuddin's* case. However the Punjab Chief Court in *Harnam Singh v. Sujwal* 8 I. C. 307 (1910) reviewed the authorities and came to the conclusion. "On the authorities cited we have no hesitation in differing from the decisions in the cases of *Mohinuddin* (6 Bom. 650) and *Ismail* (23 Bom. 682) and in holding that the gift was valid, placed the donee in the shoes of the donor, and necessitated notice on the donee of the foreclosure, although the donor was still alive." But curiously in *Sharif Husain v. Rukan Din* (Lah. 1922) 70 I. C. 493. The Lahore High Court took the contrary view, but it may be noted that *Harnam Singh's* case was not brought to their notice.

The Madras High Court considers such a gift valid vide *Yacoob Sahib v. Pacha Bibi* 88 I. C. 248 (Mad. 1915) and *Ajagar Hazar Sahib v. Chedulavada Annammah* 103 I. C. 63. (Mad. 1926). The Calcutta High Court has consistently held the gift of equity of redemption as valid. vide *Tara Prasanna Sen. v. Shandi Bibi* (1922) 49 Cal. 68.

However the fact of mere indebtedness of the donor is in itself not sufficient to establish such fraud *vide Azimunissa Begum v. Dale* 6 Mad. H. C. R. 456.¹

If a Muslim purchases some property or invests some money on the name of his wife or child, then no presumption arises that the gift of the property or investment was intended by the father. In other words the doctrine of advancement known to the English lawyers is not applicable in India, and this was the view held by the Privy Council in *S. Ezar Ali v. Must Bibee Altaf* 13 Moo. I. A 232. . . . that "purchase made with money of A in the name of B is for the benefits of A, and that, from the purchases by a father, whether Mahomedan or Hindoo in the name of his son, you are not at liberty to draw the presumption on which the English law would draw, of an advancement in favour of that son."²

Marz-ul-maut, death illness,³ is a malady of a kind that it is highly probable will end fatally and it actually so ends. And under Anglo-Muhammadian Law there must be probable and immediate apprehension of death in the mind of the person suffering from the illness.

¹ Vide *Sadik Husain v Hashim* 38 All, 627. *Chunder Madhub v. Ameer Ali* 25 W. R. 119.

² *Nagimbhai v. Abdullah* 6 Bom. 717. *N. Ibrahim Khan v. Ummat-ul-zoltsa* 19 All. 267.

³ The lame the paralytic and the consumptive if chronic, and in short any person suffering from long continuous illness for a year or so are not in a state of *marz-ul-maut* for there is no immediate and approximate apprehension of death in these cases. But in some cases, paralysis or consumption may be deemed as *marzul-mat*. The following cases may be noted as to what is *marz-ul-maut*.

Long standing trouble of Asthma is not a case of *Marz-ul maut* vide '*Labbi Bibi v Bibbun Bibi* (1874) 4 N. W. P. H. C. 159 : *Hasrat Bibi v Goolam Jaffar* 3 C. W. N. 57 (1898).

A long lingering disease is not death illness vide "*Muhammad Gulshere Khan v. Moriam Begum* 3 All. 731 (1881).

Albuminuria for longer than a year is not *marz-ul-maut* vide '*Fatima Bibi v. Ahmad Baksh* 37 Cal. 271 (1907) P. C.

A bursting of a blood vessel is not *marz-ul-maut* vide "*Ibrahim Goolam Ariff v. Saiboo*' 34 I. A 167 P. C.

Paralysis is not death illness vide "*Sarabal v. Raibi*" 30 Bom. 537 (1906). where the Law has been discussed fully

Mr. Abdur Rahim (Muhammadan Jurisprudence p. 256) observes that under Muslim Law "a subjective apprehension on the part of the patient himself can not, it is submitted, be decisive of the inquiry and is hardly of much importance", and he questions the following rulings as they lay stress on the subjective apprehension of death (31 Cal. 319, 37 Cal, 271, and 35 Cal. 1) The fact of death illness must be established by some external indicia viz., inability to attend to necessary avocation.

(a) The gift made in death-illness to a stranger is only lawful if possession is taken of the gift before the death of the donor, and it is lawful to the extent of one-third of his estate only.¹ It would be valid to the extent more than one-third of his estate if the heirs consent to it after the death of the donor. If the donor dies without making delivery then the gift is void.

(b) The gift made in death-illness to an heir is not valid even to the extent of one-third, unless other heirs give their consent after the death of the donor.

(c) A gift made during illness would be valid to the whole extent if the donor recovers his health,² and even in cases of prolonged illness which has continued for more than a year provided the gift was made after one year, and before the donor had become absolutely bed-ridden in a state of dying.

Whether rapid consumption is marz-ul-maut for the affirmative vide "Rashid v. Sherbano" 31 Bom. 264 (1907) "Fazl Ahmed v. Rahim Bibi" 40 All. 238. For the negative vide, "Jangira v. Mohammad" 49 Cal. 477 (1922).

The actual pains of child birth are considered as marz-ul-maut "Shams-ul-Hasan v. Syed Hasan" 71 I. C. 286 (All. 1922).

1 It is evident that if a person in death illness makes a gift of some property which is much less than one third of his estate, then such a gift is obviously valid, the rule speaks about one-third of the estate. And on the contrary if a person makes a gift of a house and he has no other property besides that, then the donee, must return two-thirds of the same house to the heirs.

If a person in death-illness acknowledges a debt, the acknowledgment is conclusive as against heirs and legatees, but if the acknowledgment was made in favour of an heir then it is not effective.

2 It is obvious that an illness from which a sick person recovers is not death-illness, in fact it is considered as a gift made in health

A woman makes a gift of her dower to her husband, then if she recovers her health it would be valid, but if it ends in her death, the gift would not be valid without the consent of the heirs.

(d) Anglo-Shia Law is the same as the Hanafi Law that is the gift is valid to the extent of one-third only.¹

Under Anglo-Muslim Law, where a *pardanashin* woman makes a gift, it is incumbent on the donee to satisfy that the donor knew what she was doing the presumption that a person who affixes his signature understands it full well does not effectuate the gift entirely, something more is required *viz.*, that the donor had acted independently and not under coercion or undue influence.²

A gift cannot be made to take effect on the event of some contingency, *viz.* I will give this thing to you to-morrow. If A enters this house then I will make a gift of this thing to you.³

Hiba-bil-'iwaz is a transaction made up of two distinct donations, separate acts of *hibas*, between two persons, each of whom is alternately the donor of one gift and the donee of the other. That is, the donee of a certain gift makes a gift to the original donor signifying his wish, that the present gift is by way of return '*iwaz* for the original gift.⁴ *e.g.* "This is the '*iwaz* in the place of thy gift."

Under Algo-Muhammadan Law the term *Hiba-bil-'iwaz* has acquired quite a different meaning, it is deemed to be a gift for

1 Vide *Khurshed Husain v. Faiyaz Husain* 36 All 289 (1914) Where original authorities which are somewhat conflicting were considered and the Court held that the Shia Law is it the same as Sunni Law.

2 *Ashgar Ali v Delroos Banoo Begum* 3 Cal 324 (1877) where the lady had executed a deed without any consideration for it. In *Mariam Bibi v. Sakino* 14 All. 8 (1892) where the deed was set aside, the executant was in great mental distress and the deed was drafted in artificial language and not shown that she understood it.

3 A Shia Muslim made a gift to a person for his life and in the event of his death leaving no male issue to another person. The latter gift was treated as contingent gift, vide *Casamally v. Corrimbhai* 36 Bom. 214 (1911). Again in *Sadiq Husain v. Hushim Ali* where a Muslim made a gift of his prberty to his wife and after her death to his children. the Privy Council observed that the latter gift was contingent but expressed no opinion as to its validity.

4 Ballie has pointed out (Digest pp. 122 and 532) that the term *Hiba-bil-'iwaz* is inaccurately used and it seems to apply to transactions which appear to be really sales. The Courts in British India should bear this fact in mind when documents are to be construed. Under the Muslim Law *hiba-bil-'waz* consists of two distinct acts of donations. The original gift is absolutely independent and without regard to

a consideration and it resembles a sale in all its incidents. It is obvious that in the case of *Hiba-bil-iwaz* whatever is valid consideration for a contract within the meaning of section 2 cl. (d) of the Indian Contract Act 1872 would be a valid consideration in this case also. And such a transaction is undoubtedly a sale within the meaning of section 54 of the Transfer of Property Act and it should comply with all formalities, registration etc., as required under that Act.¹

The following conditions are essential.²

(a) The actual payment of consideration by the donee, but the adequacy of the consideration is immaterial.

(b) The donor must intend to transfer and to divest himself *in præsenti* of the property, and to confer it upon

the second donation in any way. It is a case of mutual gifts which are so common in our own society. We only refrain from making the statement that it is an *'iwaz* instead we wait for a suitable opportunity and use it as pretext to make a reciprocal gift. The only difference is that under Muslim Law such a transaction as if of reciprocal gifts becomes irrevocable after the acceptance of the latter gift.

It is respectfully submitted that the recognition of this special transaction by Anglo Muhammadan Law has not in effect superseded the old *Hiba-bil-'iwaz*. Both these transactions are an integral part of the present Anglo-Muslim Law in India, and it will be open to the parties to establish whether it is old *Hiba-bil-'iwaz* or the new '*Hiba-bil-'iwaz*' on the facts of each particular case.

1 Vide *Abbas Ali v. Karim Baksh*, 13 C. W. N. 160. (1919) and. it was held that a copy of the Holy Koran is a good consideration for *hiba-bil-'iwaz*.

2 In the following decisions the transactions have been held to be *Hiba-bil-'iwaz* *Mahammad Faiz v. Ghulam Ahmad* 3 All. 490 (1881); 8 I. A. 25 which is a case of transfer of two villages to a widow who in consideration of the grant gives up her claim to her husband's estate. In *Khajooroonissa v. Rowshan Jehan* 2 Cal. 184 (1876); 2 I. A. 291, the Privy Council pointed out that the adequacy of consideration is immaterial. In *Chaudhri Mehdi Hassan v. Muhammad Hasan* 28 All. 439, 33 I. A. 68 (1906). it was pointed out that there must be an intention by the donor to divest himself in *præsenti* of the property. Vide also *Mohan Lal v. Mahmud* 44 All., 580 (1922) *Muhammad-unissa v. Bachelor* 29 Bom. 428 (1905) *Ashidbai v. Abdulla* 31 Bom. 271 (1903).

As to whether a transaction is *hiba* or *Hiba-bil-'iwaz* depends on the facts of that case, *Seraj-ud-din v. Isab* 49 Cal., 161 (1922) again in *Sarif-ud-din Mohammad v. Mohi-ud-din* 54 Cal., 754 (1927), the Calcutta High Court pointed out the difference between a true *Hiba-bil-'iwaz* the doctrine of *seisin* and *musha* apply both to original gift and the *'iwaz*.

In *Rahim Baksh v. Muhammad Husain* 11 All., 1 (1888) Mahmood J. held that gift in consideration of past services is not *hiba-bil-'iwaz* but simple *hiba*. In this case Mahmood J. tested the transaction first from the point of view of the old *hiba bil-'iwaz* and also the new *hib-bil-'iwaz* of Anglo-Muhammadan Law.

the donee, though delivery of possession is not necessary for its validity.¹ Such a transaction from its very nature is irrevocable.

Musha denotes an undivided but known share in property.

Musha Gift

The gift of an undivided share of any property which does not admit of partition is lawful. But the gift of property which does admit of partition is not lawful, and according to some jurists even if possession is taken, it would not establish its property in the donee, but according to other jurists it would establish ownership invalidly *fasid*.²

And if a person who had made a gift of an undivided part of a thing which admits of partition and subsequently he makes a partition and delivers it to the donee, such a gift would be deemed to be valid.³

1 Gift of property to wife has been held in several cases as hiba-bil-'iwaz though possession was not delivered to the wife Muhammad Eusuph v. Pattamsa Ammal (1889) 23 Mad, 70 and vide Ram Prasad v. Rahat Bibi 18 O. C 367.

(Again in Firoz-ud-din Ahmad v. Sirdar Shah 79 I. C. 81 (Lah. 1924) the old view was re-affirmed that in hiba-bil-'iwaz delivery of possession is not essential.

2 The instance of indivisible things are a small house or bath. In Kaim Husain v. Sharifunnissa 5 All. 285 (1833) staircase, privy and a door were used in common and it was held that the gift of the owner's undivided share in the staircase is valid for a staircase is not capable of partition.

In Muhammad Mumtaz v. Zubaida 16 I. A. 275 The Privy Council observed the doctrine relating to the invalidity of gifts of Musha is wholly unadapted to the progressive state of society and ought to be confined within the strictest rules." In Alabi Koya v. Mussa Koya (1901) 24 Mad. 513, the Madras High Court held that the doctrine of Musha did not apply in the Madras Presidency but this case was overruled vide Vahazullah v. Boyapati (1907) 30 Mad. 519.

Again in Ibrahim Goolam Ariff v. Saiboo 35 Cal. 1; 34 A. I. 167. Where a person made a gift of 1/3 of the house situated in Rangoon, the Privy Council applied the Law of Musha, but expressed an opinion that it would be inconsistent with the previous ruling "to apply a doctrine which in its origin applied to very different subjects of property, to shares in companies, and freehold property in a great commercial town."

3 Where the gift was of a certain undivided property but it was subsequently separated and its possession was delivered to the donee. Such a gift, invalid in its inception, was treated as valid. Muhammad Mumtaz v. Zubaida (1889) 11 All. 400; 16 I. A. 205. Mahomed v. Cooverbai 6 Bom. L. R. 1048; but vide Mohib Ullah v. Abdul Khalik 80 All. 250.

Where definite shares were recorded in the khewat, the Musha was deemed to be cured, and the deed which did not state the shares which donees were to take was held to be valid. Zaibunissa v. Irshad Hussain 89 I. C. 284 (Oudh 1925).

Sadqa of an undivided part of a thing capable of division is similarly not valid as is in the case of a gift.

Under the *Shia* Law a gift of an undivided share (whether capable of partition) is lawful.¹

Exceptions under Anglo-Muslim Law :—

- (i) Where one of two or more co-sharers transfers his undivided share in the property to the other, or one of the others.²
- (ii) Where the right to receive separately a definite share of the rent of some undivided property is transferred.³
- (iii) Where the gift is of a share in some *zamindari* property, or of a share in property situated in a commercial town or of sharers in a land company.⁴

The mere chance of an heir-apparent succeeding to the estate of a person cannot validly form the subject of a gift.⁵

Spes Successiones

In *Abdul Aziz v. Fateh Mahomed* 38 Cal. 518 (1911) ; 9 I. C. 635 the donor had recognised the donee's joint possession for fourteen years with himself, it was held that *Musha* did not apply.

1 Baillie's Digest 11 204-5 vide also *Haji Kalab Hossein v. Must. Mehrum Bibee* 4 N. W. 155 (1872) and *Sadik Hussain v. Hashim Ali* (1916) 43, I. A 212 38 All. 627.

2 As regards where the gift is made by one co-heir to another vide *Ameens v. Zeifa* 3 W.R. Civ. Rule 37 (1860) *Maanaghton President of Gift* case 13 Q. 1 p. 212, and vide *Mahomed Bakhsh v. Hosseini Bibi* 15 Cal. 684, (1888) 15 I.A. 81. In this case the mother made a valid gift of her 1/6 undivided share in her deceased daughter's estate to the children of that daughter only, there being also a husband. Recently in *Ahmad v. Qamarul Zaman* 102 I C. 829 (Lah. 1927), the Court made a distinction between gifts by a co-heir and by a co-sharer. It is submitted that it is too late to make this distinction now in Anglo-Muhammadan Law.

3 As regards the right to receive share of rents of undivided land in *Ameeroon-nissa v. Abedoonnissa* L.R. 2nd App. 87 (1875) the question was raised but not decided, however in *Jiwan Baksh v. Imtiaz Begum* 2 All. 93 (1800) and in *Kasim Husain v. Sharif-un-nissa* 5 All. 285 (1883) it was observed that the rule of *Musha* was not applicable to such cases.

4 As regards gift of property in a commercial town the gift is valid, vide *Ibrahim Goolam Ariff v. Saiboo* 35 Cal. 1 (1907) 34, I.A. 167.

5 Vide the Transfer of Property Act S. 6 (a). *Snmsoodin v. Abdul Husain* (1906) 31 Bom. 163. *Asa Beevi v. Karuppan Chetty* (1917) 41 Mad. 365. *Abdul Wahid Khan v. Must. Nuran Bibi* (1885) 11 Cal. 597. 12 I.A. 91. But vide *Hashmat Ali v. Kaniz Aatma* 13. A. L. J. R 110 (and *Chahlu v. Parmal* 41 All. 611.)

But the heir's interest after being vested may be transferred. *Mahammadunnissa Begum v. J. C. Bachelor* 29 Bom. 428 (1907) (a case of contract).

There are several grounds which prevent retraction of gift and some have been judicially recognised. *e.g.* **Revocation of gifts.** the destruction of the gift, whether by gift or it having been transferred by the donee, or having changed its identity or having been increased in its value.¹

¹ The gift of the land cannot be revoked after the donee had constructed a house on it. Vide *Mulani v. Maula Bux* 78 I.C. 222 (All. 1923) 46 All. 260. *Wali Bandi v. Tabeya* (1919) 41 All. 534 ; *Maqbul v. Ghafurunnissa* 36 All 383 (1914) a case of change of identity.

CHAPTER XI

SHUF'A — THE LAW OF PRE-EMPTION

§ 1. *History.*

The original meaning of *shuf'a* is conjunction. The right of Pre-emption means a right to be substituted in place of the transferee of some immoveable property by reason of such right, and according to some, it means a right to acquire by compulsory purchase some immoveable property in preference to all other persons by reason of such right. The law of *Shuf'a* has developed out of a few *hadises*, *traditions*, of the Prophet mentioned in *Al-Kutub as-sittah*¹ and some sort of the law of pre-emption in a vague form is found in almost all countries of the world,² but the Muslim Law of pre-emption is a highly developed and a scientific exposition of a very difficult branch of jurisprudence, since it is a successful endeavour to restrict individual rights of ownership and its transfer in harmony with equitable principles. Indeed in this part of the Muslim Law Imam Abu Hanifa and his disciples have left a unique and distinct mark on the theory of jurisprudence.

In India, the Law of pre-emption commenced as the personal Law applicable to the Muslims, but it was soon made applicable to other communities as customary Law. Accordingly Mahmood J. in *Sheoratan Kuar v. Malupal Kuar* 7 All. 267 (1885) says, "Though originally a mere rule of law administered by the Courts, pre-emption has been adopted as a custom by village communities, in various parts of India. They have in some respects altered the incidents of that right, but such alteration has almost invariably been in the direction of strengthening the right, removing its limitations and ex-

¹ The Muslim Law of Pre-emption by the present author, pp, 425—432,

² Ibid, pp, 1—3. (For short references)

tending it beyond the original contemplation of the rule of Moham-madan Law....." Again in *Digambar Singh v. Ahmad* 37 All. 129, (1915). The Privy Council observes to the same effect, "Pre-emption in village communities in British India had its origin in the Muhammadan Law as to pre-emption and was apparently unknown in India before the time of the Moghul rulers. In the course of time customs of pre-emption grew up and were adopted among village communities. In some cases the sharers in a village adopted or followed the Muhammadan Law of Pre-emption. In other cases, where a custom of pre-emption exists, each village community has a custom of pre-emption which varies from the Muhammadan Law of pre-emption, and is peculiar to the village in its provisions and its incidents....."

At present the Muslim Law of Pre-emption is administered by the Courts of British India on the ground of "justice, equity and good conscience." Spankie, J. in *Chundo v. Alimooddeen*, 6 N. W., 28 (1873) and Mahmood, J. in *Gobind Dayal, v. Inayatullah* 7 All, 775, (1884), insisted that the Muslim law of pre-emption should be treated under the Bengal, N.W.P. and Assam Civil Courts Act as a "religious usage or institution," but the majority of the judges were not prepared to accept this view. The Muslim law of pre-emption is recognised to a limited extent in the Bombay Presidency, and it is not recognised in the Madras Presidency even on the ground of equity and good conscience except in Malabar. In the Punjab, the law of pre-emption is regulated by the Punjab Pre-emption Act I of 1913. And in the North-West Frontier Province pre-emption is regulated by the Regulation II of 1906. In Oudh it is regulated by the Oudh Law Act XVIII of 1876. The recent Act regulating pre-emption is the Agra Pre-emption Act XI of 1922, as amended by Act VIII of 1923. All these enactments have abrogated the Muslim Law. Nevertheless they betray their singular indebtedness to the Muslim Law and may be taken as its natural expansion and development.*

* Some of the following sections of the Agra Pre-emption Act XI of 1922 may be cited as illustrative of this view, on some points they adopt Muslim Law and on some they differ from it. Section 16 embodies the rule of Muslim

There is no doubt that the origin of the right of pre-emption in upper India is traceable to the Muslim Law.¹ That the custom when it exists must be presumed to be founded on, and co-extensive with the Muslim Law, unless the contrary be shown.² At the same time it should be admitted that on some points custom has materially changed the Muslim Law nay, even the formalities of pre-emption about the making of demands have been dispensed with. In *Zamir Husain v. Daulat Ram* 5 All. 110 (1883) it was held that "the formality of *ishtishad* not being one of the incidents of such custom, it was not necessary that the plaintiff should have observed that formality as a condition precedent to the enforcement of such right." But if the custom is silent on any particular point, the Muslim Law would be applied by analogy, *vide Bhawani Prasad v. Damru* 5 All. 197. Mr. Kathalay however maintains the contrary view, and in fact challenges the influence of Muslim Law of Pre-emption on the customary Law. He observes, "There is intrinsically no reason why the village communities in the Province of Agra, should not recognise the right without borrowing it from the Mahomedans."³ It is maintained by the same author that it is not possible to describe the origin of the right of pre-emption in the Punjab to the Mahomedan Law of Pre-emption.⁴

Law that a pre-emptor must pre-empt the whole property sold and not a part of it.

Section 21 embodies the rule if a pre-emptor associates with himself a stronger he forfeits his right of pre-emption.

Section 13 embodies the rule of Muslim Law that property is to be divided equally between Pre-emptors of equal degree.

Section 12 gives its own classification of pre-emptors and not that of Muslim Law. Section 23 allows the cause of action to survive after the death of the pre-emptor, as is the case under the Shafi and the Shia Law but not under the Sunni Law.

Sections 14 and 15 have dispensed with the demands of pre-emption of Muslim Law and speaks about notice by the vendor to pre-emptors who on receipt of notice should signify their intention to pre-empt the property to the vendor.

¹ Also observed by Mohammad J. "The right of pre-emption though it has undergone some essential alterations.....is not traceable at least in these provinces to any sources other than the influence of the Muhammad law." (5 All 197).

² *Fakir Rawat v. Sheikh Emambaksh* (1863) B. L. R. Sup. Vol. 85,

³ *The Law of pre-emption*, p.

⁴ *Ibid*, p. 120.

The reasons given by the author are theoretical and not so convincing, though it is possible to connect the right of pre-emption with the origin and development of village communities.¹

§ 2. *Legislative and Judicial Development*

The classes of Pre-emptors. The right of pre-emption appertains² (i) to *Shafi'-i-Sharik*, a partner in the property, owner of an undivided share, a co-sharer; (ii) *Shafi'-i-Khalit* a participator in the immunities and appendages of the property³; (ii) *Shafi-i-jar* neighbour, owner of contiguous immoveable property, a pre-emptor by right of vicinage.³ In case of competition the first class excludes the second and second excludes the third.

The privilege of *Shuf'a* appertains to '*aqar*,⁴ that is immoveable property. The right of pre-emption by vicinage applies to

1 The Muslim Law of Pre-emption is frequently modified by local custom and is applicable among the Hindus by custom and under the *Wajib-ul-'arz*. In Bihar and Gujrat (Surat and Broach) a custom of pre-emption is recognised among the Hindus, *Parasasth Nath v. Dhanai* (1905); 32 Cal., 988; *Fakir Rawat v. Imam Baksh* (1865), B. L. R., Sup. Vol. 55; *Jadu. v. Jani Koer* (1908) 35 Cal., *Gurdhandas v. Pankor* (1869), 6 B. H. C. A. C., 263, but 'vide' *Dahya Bhai v. Chuni Lal* (1913), 38 Bom., 183. A statement in the '*Wajib-ul-'arz*' is good 'prima facie' evidence of custom. A Muslim pre-emptor may lawfully base his claim in the alternative either on the Muslim Law or on the ground of custom. *Abdul Hamid*, 36 All., 576 (1914); 12 A. L. J. R. 966.

2 The right of pre-emption arises when there is a sale to a stranger, and the term stranger means in the pre-emption law a person who is neither a co-sharer nor participator in the appendages nor a neighbour in the subject-matter of pre-emption. A co-sharer who has concealed his interest (that is, there is a secret purchase, '*bainami farzi*,' in the name of another) cannot defeat the pre-emptive right of a '*bona fide*' co-sharer without any notice of the concealed purchase *Beni Shanker Shalhet v. Mahpal Bahadur Singh*, 9 All., 481 (1887).

3 The owner of a dominant tenement may lawfully pre-empt the servient tenement, his claim is preferred to that of a neighbour. And likewise the owner of the servient tenement in respect of the sale of the dominant tenement is preferred to a mere neighbour; *Ranchoddas v. Jugal Das* (1899), 24 Bom. 414; *Karim v. Priyo Lal* (1905), 28 All., 127; 2 A. L. J. R., 612. However a '*khalit*' is not necessarily an owner of dominant or servient tenement.

4 The subject of pre-emption must be '*Aqar* and that which comes within the meaning of the term '*Aqar*. '*Aqar* means immoveable: property. '*Aqar* includes land whether arabic or pasture, mansions, vineyards, gardens and enclosures, e.g., a bath, a well. It includes agricultural land. *Sheikh Jahangir v. Lala Bhekari Lal*,

small plots of land and enclosures. It does not apply to large estates.¹

Under the *Shi'a* Law,² there is no right of pre-emption if there are more than two co-sharers and there is no right of pre-emption on the ground of participation in the appendages nor on the ground of mere vicinage.

The rights of all pre-emptors of one and the same class are equal, and they are entitled to equal shares *per capita*, but under the *Shafi-i* Law the shares claimable are not necessarily equal, but should be in proportion to their respective interests in the property.

It appears that according to the High Court of Allahabad both the seller and the pre-emptor must be Muslims, and the personal law of the purchaser is of no consequence. That the *Shi'a* law of Pre-emption is to apply when both the vendor and the pre-emptor or either of them is a *Shia*. According to the Calcutta High Court the vendor, the vendee and the pre-emptor should all be Muslims, and in Bihar the Muslim Law of Pre-emption is recognised to be the territorial Law irrespective of the persuasion of the parties.³

6 B. L. R., 42 ; 11 W. R., 71. Moveables if they are accessories are included in the term 'Aqar.' There is no pre-emption if trees or buildings are purchased with a view to removal they are not included within the term 'Aqar.' It is otherwise if trees are purchased with the ground on which they stand.

1 Abdul Azis v. Khondkar Hamid Ali, 2 B.L.R.C., 363 ; Ejnas Kooer v. Sheikh Amjad Ally, 2 W. R., 261 ; Roshun Mahomed v. Mohomed Kalim, 7 W. R., 150. etc. In Mahomed Husain v. Mohsin Ali, 14 W. R. F. B., 1 ; all authorities were closely examined. However a partner in a big estate has a right to pre-empt when one of the co-sharers of the estate sells his share, Sheikh Karim Baksh v. Kamaruddin Ahmad, 6 N.-W. P. H. C. R., 377.

2 Baillie, Part II, p. 175 (Sharaya-al-Islam) ; Ameer Ali, Vol. 1, p. 787 ; Sircar, T. L. L. (1874), pp. 443—362 ; Abbasi, pp. 111—120. The 'Shi'a' Law of Pre-emption is recognised by the Indian High Courts vide Abbas Ali, v. Maya Ram 12 All., 229 (1883) ; Rajah Deedur Hossein, v. Rancee Zahooroonissa 2 Moo. Ind. Ap., 441 ; Qurban Husain, v. Chote 22 All., 102 (1899).

3 Ameer Ali, Vol. 1, p. 721 ; Wilson, p. 382 ; Tyabji, pp. 663 664 ; Abbasi, p. 33. The Muslim Law of Pre-emption by the present author p. 9.

(a) Personal Law of the vendor :—

The seller must be governed by the law of pre-emption, e.g., if a non-Muslim sells some property, then there is no pre-emption under Anglo-Mohammadan Law.

In Pir Khan v. Faiyaz Husain, 36 All., 488 (1914). A 'Shi'a' sold some property

The right of pre-emption takes place when some property subject to pre-emptive right is transferred by a Valid Sale. valid sale, or by some means equivalent to a valid sale. There must be an exchange of property for property or money and there must be an entire cessation of the vendor's interest.

According to the Muslim Law sale means commutation of goods for goods, goods for money, of money for money, of money for goods. Sale is contracted by declaration and acceptance, the subject and consideration of sale must be determinate and the subject must be in actual

to the vendees who were Hindus. A 'Sunni' pre-emptor claimed to pre-empt the property. The Shi'a vendor succeeded on the ground that there was no right of pre-emption for there were more than two co-sharers. It seems that according to the Allahabad High Court the Shi'a Law of pre-emption is to apply when both the vendor and the pre-emptor or either of them is a Shi'a. The Calcutta High Court in *Jog Deb Singh v. Mahomed Afzal* 32 Cal., 982 (1905) allowed the 'Sunni' law to prevail where the vendor was a Shi'a and the pre-emptor was a 'Sunni.'

(b) Personal Law of the vendee :—

If a Muslim sells some property to non-Muslims according to Allahabad High Court there is pre-emption under the Muslim Law *Gobind Dayal v. Inayat Ullah* 7 All., 775. But according to Calcutta High Court there is no pre-emption at all. *Kudrat Ullah v. Mahini Mohan Shaha* (1169), 4 Beng. L. R., 134 ; 13 W. R., 21.

According to previous decisions of the Allahabad High Court the right of pre-emption could be enforced even if the seller was a Hindu. *Chundo v. Hakeem Alimoddeen* (1873), Agra F. B., 205 ; 6, N. W. P., 28. The last case was overruled in *Dwarka Das v. Husain Baksh* 1 All., 564 (Stuart, J. and Pearson, J. dissenting) ; but there is no doubt that the earlier cases were in conformity with the Muhammadan Law. As regards Bihar it has been held by the Privy Council in *Jadu Lal Sahu v. Janki Koor*, 9 A. L. J. R., 525, 39, I. A., 101 ; that "in Bihar the right of pre-emption under the Muhammadan Law is enforceable irrespective of persuasion of the pre-emptor, vendor and vendee."

(c) Personal Law of the pre-emptor :—

The pre-emptor must be a Muslim to claim pre-emption under the Muslim Law. A Shi'a however cannot claim pre-emption on the ground of vicinage, even if the seller and purchaser were 'Sunni' Muslims. *Qurban Hasain v. Chote* 22 All., 102. But vide *Rokaiya Begam v. Ahmadi Khanum* (1912), 9 A. L. J. R., 769, where a purchaser a Shi'a woman was allowed to defend the suit on the ground that she was a 'Shafi'-i-khalit' and the 'Sunni' pre-emptor was also a 'khalit' and the pre-emptor's contention that under the Shi'a law 'khalits' have no right of

was rejected by the Court.

existence. The Muslim Law does not prescribe any particular form for a sale transaction. The conception of sale under the Muslim Law is wider than the conception of sale under the Transfer of Property Act, Section 54, in fact it includes the definition of exchange as defined in Section 118 of the Transfer of Property Act. In *Begum v. Muhammad Yaqub*, 16 All., 344., F. B. citing original authorities the Allahabad High Court has held that the sale must be complete according to the Muslim Law. However in this very case Mr. Justice Banerji took the contrary view, and similar view was expressed by Mr. Justice Mahmood in *Janki v. Girjadat* (1881), 7 All., 482. F. B. The Calcutta High Court in *Budhai Sardar v. Sana Ullah* (1914), 41 Cal., 943 and the Patna High Court in *Kheyali v. Mallick Nazrul Alam* (1916), 1 Pat. L. J., 174, did not accept the view of the Allahabad High Court and held that Sec. 54 of the Transfer of Property Act embodies the general law which is paramount and supersedes the Muslim Law. In *Abdullah v. Ismail* 46, Bom. 302, the Bombay High Court preferred the view of the Allahabad High Court and held that a right of pre-emption arose in the case of an oral agreement to sell followed by payment of price and delivery of possession to the vendee even though no registered sale-deed was executed. It seems that the difficulty could be solved in each case by determining the actual intention of the parties as suggested in *Sitaram v. Jiaul Hasan*, 45 Bom., 1056 (P. C.)

There is no right of pre-emption in an invalid sale¹ so long as the invalidating circumstances or conditions continue to exist.

1 It is to be determined under the Muslim Law as to what is an invalid sale, as for instance by reason of uncertainty in price or the time for delivery of the property sold. *Najam-un-nissa v. Ajaib Ali*, 22 All., 343 is a good case to illustrate what is an invalid sale and its effect on ownership of the vendee. The facts are that Aminullah sold a house and site to Ajaib Ali stipulating Rs. 84 for the site and a further sum for the house to be ascertained by carpenters or masons appointed by the vendor and the vendee, and upon the additional sum being paid possession of the house would be made over within 10 days. This transaction took place by a registered contract of sale on the 17th May, 1895. Abrar Husain, the owner of adjacent houses, sold his property to Najam-un-nissa on the 14th July, 1896, Ajaib Ali instituted a suit for specific performance and eventually obtained possession of the house on the 6th of September, 1896. *Najam-un-nissa and Ajaib Ali*

The right of pre-emption in an invalid sale arises when the vendee exercises his right of ownership, and obtains possession of the property or erects a building or plants trees on it.¹ However in no case ownership relates back to the date of the original contract for sale or of sale, the ownership of the vendee dates from the date of his taking possession of the property.

In the case of mortgage the right of pre-emption arises after the right of redemption has been foreclosed. If a mortgagor sells the mortgaged property with its encumbrances or he sells the equity of redemption the right of pre-emption arises.²

In the case of release from debt the right of pre-emption arises, e.g., where a debtor gives some property to his creditor on condition that he shall release him from the debt.³

sued one another, each claiming a right of pre-emption against the other. The Court held quite correctly, that Ajaib Ali did not become owner of the house purchased by him until the 6th September, 1896, and therefore he was not entitled to claim pre-emption against Najam-un-nissa when she purchased her houses on the 14th July, 1896, and that Najam-un-nissa was entitled on the sale to Ajaib Ali becoming complete on the 6th September to claim pre-emption against him

1. According to the 'Fatawa-i 'Alamgiri the mere fact of taking possession is not sufficient at all, it mentions the case of erecting a house along with taking possession

2 If the mortgage be such that a decree for sale would be passed then the right of pre-emption arises when the sale becomes absolute under Order 34, Rule 5 or 8 of the Civil Procedure Code. The leading cases are; Batul Begam v. Mansur Ali Khan, 20 All., 315 F.B; affirmed by the Privy Council in 24 All., 17; approved by the Punjab Chief Court F.B., in P.R., (1901), No. 103, Ali Abbas v. Kalka Prasad, 14 All., 405 F.B.

In the case of mortgage by conditional sale the right of pre-emption arises when the conditional sale becomes absolute, Ajaib Nath v. Mathura Prasad, (1888), 11 All., 164. The pre-emptor may show what an ostensible mortgage is in fact a sale transaction, P. R. (1904), No. 145.

3 In the case of assignment of property for payment of debts if the property is made over in complete discharge of the debts then such a transaction practically amounts to a sale. When however the property is handed over to the trustees to manage the property and pay off the debt and then return the property to the debtor, it is not a sale and there is no pre-emption. Outar Singh v. Musammatt Ablakhee, 2 Agra, 328.

ANGLO-MUSLIM LAW

There is no right of pre-emption in the property assigned by
Property and a husband to his wife as her dower, but a transfer
Dower of property in lieu of the dower-debt itself does give
rise to the right of pre-emption.

In *Fida Ali v. Muzaffar Ali*, 5 All., 65. 2 A.W.N., 175. following *Pearce Begum v. Sheikh Hushmat Ali*, N.W.P.S.D. A.R., 1864. Vol. I, p. 475. it was held "Price as a term of Muhammadan Law includes not only money, but also any other kind of property capable of being valued at a definite sum of money. But when a transfer of property takes place for a consideration not capable of being estimated at a definite money value such transfer is not regarded as sale at all and does not give rise to the right of pre-emption. Therefore when a man marrying, a woman does not fix the amount of dower at a money value, but assigns property to her as her dower, the right of pre-emption cannot have any operation, the transfer not being a sale and the consideration thereof being unascertained and unascertainable at a definite money value. But no such impediment to the operation of the right of pre-emption exists in cases in which the dower was originally fixed at an ascertained sum and the property is subsequently sold in lieu of a part or the whole of such amount."

Again if the husband transfers some immoveable property to his wife in lieu of relinquishment of her right to claim dower then the right of pre-emption does not arise. This is an instance of *Hiba-bil-'iwaz*.¹

¹ In *Ram Prasad v. Rahat Bibi*, 18 O.C., 367, a Muhammadan transferred some property to his wife in lieu of relinquishment of her claim to dower it was held that the transaction was not one of sale but of 'Hiba-bil-'iwaz'. There was an exchange of gift. The husband gave certain property and the wife gave relinquishment of her claim to dower. The same view has recently been held by the Chief Court Lucknow in *Bashir Ahmad v. Musammat Zubaida I* Luck 53 (1226) and also in *Chaudhri Talib Ali v. Musammat Kaniz 2* Luck, 575 (1927). The decisions proceed rather on technical grounds on strict interpretation of Sec. 54 of the Transfer of Property Act. Where a marriage was contracted without dower having been agreed, and thereafter the husband transfers some property in lieu of Mahr-ul-misl, dower of her equals, the right of pre-emption arises.

The right of pre-emption is not established unless the pre-emptor on hearing of the transfer from some trust-worthy source makes the demands of pre-emption in the following order.—

The demands are of three kinds,

(a) *Talab-i-muwasabat* or immediate demand.

(b) *Talabi-ishhad* or *Istishhad* or demand with invocation of witnesses also known as *Talab-i-taqrir* confirmatory demand.

(c) *Talab-i-tamlík* or demand of possession also known as *Talab-i-Khusumat* or demand by litigation.

The demands of pre-emption may be made by the pre-emptor himself or his authorised agent or his lawful guardian if he be a minor, or by the manager of a Court of Wards.¹

The distinction between *Talabi-muwasabat* and *Talabi-ishhad* is not recognised by the *Shi'a* law, all that is necessary is that the pre-emptor should prefer his claim.

Under Anglo-Muhammadian Law, the fraudulent or otherwise omission to register the sale-deed does not affect the demands of pre-emption, which would be made immediately after the execution of the deed, and they are also valid if made after registration of the sale-deed, as required by Sec. 54 of the Transfer of Property Act.²

Talab-i-tamlík :—

The above preliminary demands having been made, the pre-emptor must make *Talab-i-tamlík*, that is, file the suit in a Court of Justice.³

1 *Jadu Lal v. Janki Koer*, 1908, 35 Cal., 575; 39 Cal., 915; 39 I.A., 101.

2 In *Zamani Begum v. Khan Muhammad Khan* (1923), 46 All., 142, it was held that demands made after the execution of the sale-deed but before registration were not premature or defective. In *Budhi v. Sanullah* (1914), 41 Cal., 943 the pre-emptor after the execution of the sale-deed did not make the demands of pre-emption, it was held that he was not bound to make the demands and that his right did not arise till he became aware of the registration of the sale-deed.

3 The starting point for limitation is when "physical possession" (the term used in Art. 10 of the Limitation Act) is taken of the whole property; if the property is not susceptible of physical possession then from the time of the registration of the sale-deed. In this case Art. 120 will apply—*Ali Abbas v. Kalka Prasad*, 14

(i) Within a year of the purchaser taking possession of the property.

(ii) Within a year of registration of the instrument of sale.

This is provided by Limitation Act IX, 1908, Schedule II, Art. 10. The Limitation Act supersedes the Muhamadan Law.

Under Anglo-Muslim Law a pre-emptor need, not tender the
 Payment of purchase money at the time of asserting or de-
 Price manding pre-emption. It is sufficient that he is prepared to pay the sale consideration stated in the deed, or if he suspects it then the amount determined by the Court should be paid by him.¹ The sum decreed need not be paid if the pre-emptor prefers an appeal.

The pre-emptor must pre-empt the whole of the property
 Claim whole sold. Partial pre-emption is not allowed.
 Property.

If the pre-emptor discovers that his own property has been wrongfully included in the sale, then he may lawfully claim his own property as owner and the remaining portion by way of pre-emption.²

If the pre-emptor discovers that the title of the vendor is defective as to a portion of the property then he may claim pre-emption as to the rest of the property only, but he shall conclusively establish that the vendor had no title to that portion before the suit is decreed.³

405, *Batul Begum v. Mansur Ali*, 20 All., 315; affirmed in 24 All., 17 P.C. In the latter case the term "physical possession" was fully discussed.

Where a suit was instituted on the last date allowed by pre-emption and subsequently amended it was held not to be time barred—*Muhammad Sadiq v. Abdul Wajid*, 33 All., (1922). 'Vide' also *Yawar Husain v. Abdul Kadir*, A.L.J.R., 151 *Mamraj Singh v. Hirdry Ram*, 8 A.L.J.R., 814. *Mehdi Hasan v. Bachcha Pande*, 13 A.L.J.R., 383.

1 *Nubee Boksh v. Kaloo*, 22 W.R., 668; 1 A.W.N., 44; *Khoffejan v. Mahomed Mehdee*, 10 W.R., 211. 'Prima-facie the consideration in the sale-deed should be taken as the true consideration. Under Anglo-Muhammadian Law, there is no objection to fancy price being paid to prevent pre-emption. *B.E. O'Connor v. Ghulam Haider*, 3 A.L.J.R., 365; 28 All., 617.

2 In *Bhagwati Saran v. Parmeshar Das*, 36 All., 476, it was held that there was no defect in the frame of the suit if the plaintiff claimed the property as full owner and in the alternative for pre-emption. Vide also *Abdul Aziz v. Maryam Bibi*, 25 A.L.J.R., 48 (127).

3 *Badri Prasad v. K. M. Husain* 11 A.W.N., 44.

SHUF'A—THE LAW OF PRE-EMPTION

The right of pre-emption cannot be established*—

Right Lost (i) if the pre-emptor has omitted to demand pre-emption or enforce his right ;

(ii) if he, of his own accord, has surrendered his right of pre-emption.

(iii) if he has acquiesced in the sale of the property.

The right of *Shuf'a* once relinquished cannot subsequently be resumed.

Mere refusal to purchase before the sale does not destroy the right of pre-emption as the right of pre-emption arises after the sale.² It submitted that Under Anglo-Muslim Law in certain circumstances refusal to purchase the property contemporaneously with, that is, at the time of the actual sale transaction, may extinguish the right of pre-emption.¹

*The surrender of the right of pre-emption in favour of one person does not operate in favour of another.

The surrender of the right of pre-emption before the sale does not prevent pre-emption *Abadi Begam v. Inam Begum*, 1 All., 521; *Karim Baksh v. Khuda Baksh*, 16 All., 247.

Surrender and acquiescence are liable to be confused. The difference is that surrender is a legal plea, while acquiescence acts as an equitable estoppel.

1 It may be argued that if the pre-emptor and the vendee make simultaneous offers for the same, and if the pre-emptor was aware of this fact and allowed the vendee to take the house at a higher price then his conduct would amount to equitable estoppel on the ground of acquiescence. If the pre-emptor preferred not to exercise his claim on one occasion of the sale of a certain property, he is not thereby precluded from pre-empting the same property on the subsequent sale of that property.

In *Munawar Husain v. Khadim Ali* ; 5 A.L.J.R., p. 331, it was held, in order to debar the pre-emptive right an opportunity to purchase must be given to the pre-emptor when a definite agreement to purchase at a fixed price has been entered between the vendor and the vendee.

In *Ghulam Mohi-ud-din Khan v. Hardeo Sahai*, 18 A.L.J.R., 413; 42 All., 402; an insolvent's property was sold by public auction by the official assignee. The auction was notified and was within the knowledge of the pre-emptor, but he did not bid at the sale this was construed to be a refusal to purchase. This was a case under the 'wajib-ul-arz,' strictly speaking under the Muslim Law it would be incumbent on the official assignee to offer the property to the pre-emptor at the highest price bid at the auction.

2 The mere fact that the pre-emptor refused to purchase before the price was settled does not debar his right of pre-emption vide *Kanhni Lal v. Kalka Prasad* 2 A. L. J. R. 890. 27 All. 670.

(iv) Similarly the right of pre-emption is destroyed if the pre-emptor takes from the vendee the same property, the subject-matter of pre-emption, on rent, or negotiates with the vendee for the purchase of the property to himself, or for its lease.

It is not necessary for the vendor to give notice to the pre-emptor, and offer to sell the property to him.

(i) Under Anglo-Muslim Law if the pre-emptor together with a stranger has purchased a certain property, then his right of pre-emption becomes void with respect to the purchased property.¹

(ii) If the pre-emptor has associated with himself a stranger as co-plaintiff who has in fact no claim to pre-emption, then his own right of pre-emption becomes void.²

However if the person joined as co-plaintiff is not a stranger and is one entitled to pre-empt the property and belong to the same category then the suit is perfectly lawful.

If some property has been sold to a person who happens to be its pre-emptor also, and there are other as pre-emptors of the same degree, then under the Muslim Law the other pre-emptors are entitled

¹ This was the view also held by the Sardar Diwani Adalat of the North-Western Provinces in *Sheo Dayal v. Bhairo Ram* (1860), 15 N. W. P., S. D. A. R., 68, where it was held that a co-sharer purchasing property jointly with a stranger forfeited his pre-emptive right and rendered the entire sale liable to pre-emption by other co-sharers vide also *Guneshee Lal v. Zaryat Ali* (1870), N.W.P., H.C.R. 343 ; *Manna Singh v. Ramadhin Singh* (1882), 4 All, 252 and in *Saligram Singh v. Raghubar Dayal* (1887), 15 Cal., 224 and in *Mustaq Ahmad v. Amjad Ali*, 19 All., 811, the Court held that where the share sold to the stranger was stated in the sale-deed then that share is alone to be pre-empted on proportionate payment of the price, but where the sale-deed does not specify the share purchased by the stranger then the co-sharer-vendee is to be treated in the same position as the stranger and the claim is to be decreed against him also. However under section 45 of the Transfer of Property Act co-vendees are presumed to be equally interested in the property sold, and hence it may be argued that the claim of the pre-emptor should be decreed to that extent only and not against the co-sharer-vendee.

² This rule is based on the principle of equitable acquiescence, that is, a person (co-sharer-vendee) cannot claim the pre-emptive right which he has himself violated, by associating himself with a stranger. *Bhawani Prasad v. Damru*, 5 All, 197 ; 2 A. W.N., 217; In *Ali Ahmad v. Rahmat Ullah*, 14 All, 195; 12 A.W.N.. 42, the pre-emptor had joined the mortgagees as co-plaintiffs in the suit for pre-emption the suit was

to claim an equal share in the property sold. And if there happens to be a pre-emptor of a superior degree, then he alone is entitled to pre-empt the property.¹

If the pre-emptor previous to the decree of the Court sells the property by means of which he derives his right of pre-emption,

dismissed in toto (vide also *Rajoo v. Lalman*, 5 All. 180). Is it possible for the pre-emptor to strike out the name of the stranger associated with him in the suit? It is submitted that this error could be rectified in the Court of the first instance, but not afterwards in the Appellate Court. Under O 6, R. 17 of the Civil Procedure Code, the Court has power to amend any pleading. The Allahabad High Court has however maintained the view that amendment of the plaint cannot be allowed, *Bhupal Singh v. Mohan Singh*, 18 All., 324; 17 A.W.N., 72. But vide *Karan Singh v. Muhammad Hussain*, 7 All., 860, which favours the correct view. The Punjab Chief Court allowed the names of strangers to be struck out. P.R., No. 83 (1898); P.R., No. 29 (1894); and also No 102, P.R., No. 94 (1895); and P.R., No. 19 (1898).

The Punjab Chief Court has also held that if the pre-emptor has merely entered into an agreement with a stranger as to what he will do with the property after decree simply in order to raise funds to meet the litigation expenses then he does not forfeit his claim to pre-emption. P. R. (1898), No. 19. P.R. (1896), No. 87, P. R (1882), No. 10.

If two persons equally entitled to pre-empt file a suit and one of them withdraws, then the other may lawfully pre-empt the whole property. *Udey Ram v. Maula* 5 A. W. N., 189, and vide *Chotu v. Husain Baksh*, 13 A.W.N., 25.

If a stranger was associated with the Shafi the latter would forfeit his right of pre-emption as stated above. This is the view of the Calcutta High Court also vide *Saligram v. Raghbhardayal* 15 Cal. 224 (1887).

Where the vendee is a total stranger then the right against him is not lost owing to the fact that the pre-emptor has joined with him persons, who have different rights inter se *Sheoraj Singh v. Naik Sahai*, 41 All., 423; 17 A.L.J.R., 391.

1 The Calcutta High Court held that other pre-emptors are not entitled to claim pre-emption against the Shafi vendee that is who is also its pre-emptor vide *Lalla Noawbat Lall v. Lalla Jevan Lall* 4 Cal. 831 (1878). The old decisions of the Allahabad High Court were also to the same effect; but in *Amir Hasan Rahim Baksh* 19 All. 466 (1897) original authorities were cited before the Court, and it held in conformity with the Muslim Law that other pre-emptors of equal degree could pre-empt and take equal shares as the vendee shafi. This case has been followed in *Abdullah v. Amanat Ullah* 21 All. 292 (1899). And recently the Calcutta High Court has overruled its previous decisions and have adopted the correct Muslim Law vide *Enatullah v. Kowsher Ali* 98 I. C. 220 (Cal. 1926). The Bombay High Court has followed the Allahabad High Court, vide *Vithall Das v. Jametram* 44 Bom. 887 (1929). Consequently if the pre-emptor belongs to the same class, he would take half of the property sold vide *Nadir Husain v. Sadiq Husain* 47 All. 824 (1924).

then his right is thereby invalidated. That is, the pre-emptor must retain the pre-emptive cause at the time of the institution of the suit until the decree of the Court of first instance. It is submitted that in British India the first Court is equivalent to the Kazi's Court, hence the first decree is important, and therefore if subsequent to the decree the pre-emptor's right is extinguished, it does not affect the property pre-empted. The same view would apply if the pre-emptor's right is extinguished after the decree of the first Court but during the course of the appeal, vide *Umrao v. Lachman*, 22 A.L.J.R., 234. "In dealing with suits for pre-emption, there dates have to be looked for, namely, the date of the sale sought to be pre-empted, the date of the suit and the date of the first Court's decree."

After the pre-emptor has obtained the decree, he may sell the property to a third person who may deposit the purchase-money in Court.¹ But such a transaction may give rise to a fresh cause of action to other pre-emptors if any.

(i) If the vendee dies, the right of pre-emption is not invalidated.
Death of parties.

(ii) If after having sold a certain property the vendor dies the right of pre-emption is not invalidated.²

(iii) If the pre-emptor dies before he perfected his title, by obtaining possession of the subject-matter of pre-emption, or by judicial decree, then his right under the *Hanafi* Law is thereby

¹ *Ram Sahai v. Gaya*, 7 All., 107, where a pre-emptor alienated his share pending an appeal, held it cannot affect his right. *Sakina Bibi v. Amiran*, 10 All., 472; 8 A.W.N., 177; *Bela Bibi v. Akbar Ali*, 24, All., 119; 21 A.W.N., 183; where the pre-emptor sold his decreed share, to raise funds to pay the purchase money.

² If the vendor was suffering from 'Marz-ul-maut,' death-illness when he sold a certain property, and he had no other property, then his legal representatives according to some jurists cannot claim pre-emption with respect to the property sold, but according to others they can on paying the value of the property, but if the deceased left some other property also then there is a consensus of opinion that his legal representatives by reason of inherited property have the right of pre-emption. However according to Imam Abu Hanifa in all cases the legal representatives have no right to pre-empt the property sold.

extinguished,¹ but under the *Shafi'i* Law and the *Shi'a* Law² it passes to the pre-emptor's representatives. The *Hanafi* view has not been accepted by the Bombay High Court,³ and the Allahabad High Court has applied it subject to certain restrictions.⁴ It is submitted that under Anglo-Muhammadan Law the right to sue survives to the executor or administrator according to Sec. 306 of the Indian Succession Act XXXIX of 1925.

The doctrine of *lis pendens* has been made applicable to the Muslim Law of pre-emption. All transactions done by the vendee in possession affecting the property are voidable at the instance of the pre-emptor. The pre-emptor is to take the property as it stood at the date of sale.⁵ The judicial decisions are very instructive and conclusive.

1 Sircar, T.L.L. (1873), p. 531 ; Wilson, p. 401 ; Tyabji, p. 692 ; Kathalay, p. 124 :

2 Baillie, Part II, p. 190 ; Querry, II, p. 285 ; Secs. 89, 90 ; Wilson, p. 464.

Under the *Shi'a* Law the right is inheritable among all the heirs in proportion to their shares of inheritance e.g.,—a *Shi'a* Muslim dies after filing the suit for pre-emption and leaves a widow and son. Then if both claim pre-emption the property will be divided in the ratio of 1/8 to 7/8.

3 In Sayyad Jiaul Hussain, v. Sita Ram 36 Bombay, 144 (1911), the pre-emption was claimed under the Muslim Law and the Court held that section 89 of the Probate and Administration Act, 1881, has superseded the 'Hanafi' Law vide also Sitaram, 41 Bombay, 636 (1917), 45, Bom., 1056 (1921).

4 Muhammad Husain v. Niamut-un-nissa, 20 All, 88 (1897).

5 In Kamta Prasad v. Mohan Bhagat, 6, A.L.J.R., 966 ; 32, All., 45, a vendee having purchased the property mortgaged a portion of it to the vendor. The pre-emptor pre-empted the property and paid the sale-consideration which was then taken away by the vendee. In a suit for sale upon the mortgage, held that the vendee's right as a purchaser is subject to the pre-emptor's right of pre-emption and that the vendee cannot defeat the pre-emptive right by subsequently mortgaging the property so as to force him to take the property subject to the mortgage.

A pre-emptor made the demands of pre-emption. Subsequently the vendee transferred the property to a third person. Held that the subsequent sale must be deemed to have been effected subject to any right of pre-emption in force of the plaintiff. Muhammad Abdul Rahman v. Muhammad Ayyub Khan, 22 A.L.J.R. 817 ; (1924).

Where the vendee transferred the property to one of the two rival pre-emptors it was held that the doctrine of *lis pendens* was applicable and the other pre-emptor was entitled to pre-empt one-half share of the property on payment of one-half of the consideration. Bhagwan Sahai v. Nanak Chand (1927), 25 ; A.L.J.R.,

The right of pre-emption is not affected by the parties dissolving the sale after it was finally completed.¹

The pre-emptor becomes the owner of the property, when he takes possession of the subject-matter of pre-emption either with the vendee's consent or in pursuance of the decree on payment of the purchase money. The vendee is in the meantime entitled to retain the income and fruits of the property. In case an appeal is filed by the pre-emptor, then his title is perfected from the date of the decree of the highest Appellate Court. In *Deokinan v. Sri Ram* 12 All., 234 (1889) Mahmood, J. was of opinion that the vendee was entitled to the profits accruing up to the date when the pre-emptor acquired possession of the property in accordance with the terms of decree. This view was approved by the Privy Council in *Deonandan Prasad v. Ramdhari Chaudhri*, 44 Ind., App, 80 (1916); 15 A.L.J.R., 375, In this case under a Subordinate Judge's decree the pre-emptors were in possession from 1904. The High Court reversed the decree and the original vendee regained possession.

479. Where the purchaser acquired the status of a co-sharer 'pendente lite' held the plaintiff was not deprived of his right to pre-empt—*Roshan Singh v. Bhan Lal*, 31 All., 530.

1 The right of pre-emption was not affected where the contract was dissolved. *Bhodo Mohamed v. Radha Churn Bahi*, 18 W. R., 332.

Where after the institution of a pre-emption suit the vendee sold the property back to the vendor, held that the pre-emptor was entitled to pre-empt the property, vide *Tota Ram v. Gopal Singh*, 16 A L.J.R., 505, *Kidar Nath v. Bankey Bihari*, 11 I.C., 645 ; *Imami v. Allah Diya*, 40 I.C., 767. However in *Sheo Charan Singh v. Bhika* (1911), 14 O. C., 156, it has been held that a re-sale to the vendor before the institution of the suit defeats the right of the pre-emptor. But under the Muslim Law the demands having been made the right of pre-emption cannot be defeated provided of course that the vendee had taken possession of the property under the original sale. And happily the same Court in *Manna Singh v. Behari Singh* (1916), 19 O C., 183, overruled 15 O.C., 156, citing S.A., No. 191 of 1914 appended to the judgment. In S. A. No. 191 of 1914, pre-emption was claimed in respect not of the first but of the second sale, this view is also in consonance with the Muslim Law. *Manna Singh's* case is an authority for the proposition that once a right of pre-emption has accrued it cannot be defeated by subsequent act of the vendee, except by the act of the pre-emptor or barred by the Law of Limitation. In *Raj Narain v. Dunia Chand*, 32 All., 340, it was suggested (p. 343) where there has been a re-sale by the original vendee, the pre-emptor must claim to pre-empt both sales.

The pre-emptors appealed to the Privy Council and succeeded. They recovered possession in 1909. Held that the original vendee was entitled to mesne profits between 1900 and 1904 and also between 1904 and 1909.

The Muslim Law relating to decree and its execution is obsolete in British India. It is now provided by the Civil Procedure Code 1908, First Schedule, Order XX. Rule 14. When the Court decrees a claim to pre-emption, it shall fix
Decree of Court, a day on or before which the pre-emptor shall pay
 the purchase-money, together with costs, if any,
decreed against him. And the defendant shall deliver possession of the property to the pre-emptor, but that if the amount decreed is not paid, the suit shall be dismissed with costs.

In case of rival claims to pre-emption, the Court shall direct equal distribution of property in favour of pre-emptors of equal degree, and if there are pre-emptors of the lower degree, then the claim of inferior pre-emptors shall not take effect, until the pre-emptors of the higher degree have failed to comply with the terms of the Judgment and decree. The pre-emption decree in virtue of the terms imposed on the pre-emptors becomes a decree in favour of the defendant, when the conditions imposed are not complied with, and it becomes final if time allowed for preferring an appeal has expired. The pre-emption decree is a purely personal one and cannot be transferred, so as to entitle the transferee to obtain possession of the subject of pre-emption in execution of the decree.

* Under Anglo-Muslim Law there is difference of opinion whether a sale in execution of a decree gives rise to a right of pre-emption. For the affirmative vide *Imam Ooddeen Sowdagar v. Abdul Sobhan* 5 W.R. 169 (1866) where a part of the estate is sold in execution of a decree a co-sharer is entitled to pre-empt it. In the negative, vide *Abdul Jalil v. Khellet Chunder Ghose* 10 W.R., 165 because the pre-emptor could bid at the sale. And according to *Brij Narain v. Kedar Nath* 45 All 186 (1923) it seems the right of pre-emption arises if the property is sold by an official receiver or by an order of the Court.

Limitation for execution of the pre-emption decree—Art 131 of the Limitation Act IX, of 1908 applies. *Chhedi v. Lalu*, 24 All., 300.

CHAPTER XII

THE ADMINISTRATION OF JUSTICE OF MUSLIM LAW BY THE EAST INDIA COMPANY*

Immediately after the death of Emperor Aurangzib in A. D. 1707 the Mughal Empire lay in irretrievable ruin. It was natural for the system of administration of justice to fall along with the political power. The series of sovereigns that succeeded the great Emperor Alamgir exercised only a nominal power in the districts round about the Capital. It was at this time that the Mahrattas, the French and the English represented by the East India Company,¹ all had adopted an aggressive policy of annexation and rapid conquest. By the middle of the 18th century the Company began to combine with the ordinary mercantile pursuits, military and political activities. In 1757 after the battle of Plassey the supremacy of the Company was firmly established in Bengal.

The notable incident conferring legislative authority upon the Company occurred on the 12th of August A. D. 1765, when

*This chapter is taken from my book "the Administration of Justice of Muslim Law It will be found useful to complete the history of Muslim Law in British India,

1 The early legislative authority of the Company is found in the charter of Queen Elizabeth granted in A. D. 1601. Charters were granted by James I in A. D. 1609 and by Charles II in A. D. 1661. The charter of William III granted in A. D. 1698 established the foundation of the United Company subsequently designated the East India Company. Georges I's charter of 1726, established the famous Mayor's Courts and invested the Governors and Councils of the three Presidencies with power "to make, constitute, and ordian byelaws, rules, and ordinances for the good Government and regulation of the several corporations hereby created and of the inhabitants of the several towns, places and factories aforesaid respectively, and to impose reasonable pain and penalties upon all persons offending against the same or any of them." The charter of 1753 conferred similar powers (26 Geo 11).

Lord Clive obtained the grant of the Diwani from the Mughal Emperor Shah Alum.¹ This act is generally considered as the assumption of sovereignty by the East India Company. The office of Diwan implied the collection of the provincial revenue and the administration of civil justice. The administration of criminal justice was conferred upon the Nawab Najm-ud-daulah and the Nawab received for the maintenance of Nizamat a fixed stipend of fifty three laks of rupees.

The systems for the administration of Justice adopted by the Company are mainly based upon the regulations passed in the three Presidencies. The plan adopted in Bengal being the foundation of the system adopted in Bombay and Madras.²

The Diwani was conferred on the East India Company by the firman of the 12th August, 1765. The Indian officers carried on the general administration under the supervision of the English Resident at the court of the Nawab till the year 1772, when the court of Directors announced their intention "to stand forth as Diwan and by the agency of the Company's servants to take upon themselves the entire care and management of the revenues"³ Warren Hastings and his co-adjutors submitted a report which was adopted. The Exchequer and the Treasury were removed from Murshidabad to Calcutta. The Mufussil Diwani Adawlut known as the Provincial Civil Courts for the administration of civil justice were

1 The text of the firman was (Aitchison's Treaties India p. 60) " At this happy time our Royal Firmaund, indispensably requiring obedience, is issued, that, whereas, in consideration of the attachment and services of the high and mighty.....the English Company we have granted them the Dewanny of the Provinces of Bengal, Behar, and Orissa.....as a free gift.....As the said Company are obliged to keep up a large army... We have granted to them whatsoever may remain out of the revenues of the said provinces, after remitting the sum of 26 lakhs of rupees to Royal Circar and providing for the expenses of the Nizamut..... Written the 24th of Sophar of the 6th year of the Jallo the 12th of August 1765.

2 In Bomhay the Sadder and Mufussil Courts were established by A.D. 1799 and at Madras by A. D. 1802.

Fifth Report of Select Committee of the House of Commons 1812 p. 2.

created. These courts were presided by the collectors in the capacity of Kings Diwans.¹ The courts took cognizance of all civil disputes. The Hindus and Muhammadans were entitled to the benefit of their laws, in all suits regarding inheritance and marriage.

The Sudder Diwani Adawlut at Calcutta was presided for sometime by the Governor-General, later by the famous judge Sir Elijah Impey. In 1780 the Chief Justice of the Supreme Court,² who was appointed Judge of the Sudder Dtwani Adawlut prepared various regulations which were incorporated in the code of 1781. In the same year the Sudder Diwani Adawlut was constituted by Act of Parliament (21 Geo. 111 c. 50 s. 71) as a Court of Record.

In 1793 Lord Cornwallis established a regular gradation of Courts of Appeal, There were four Provincial Courts of Appeal.³ These were presided by three European judges and had a Kazi, a Mufti and a Pandit to advise them. The appeal went from the Provincial Courts to the Sudder Diwani Adawlut at Calcutta.⁴

During this period the Muhammadan law was undergoing a complete change. It ceased to be the national municipal law.

1 In 1774 the European collectors were replaced by the Aamils.

2 The Supreme Court of Calcutta was established by a Royal Charter in 1774. This court administered justice for the period of 88 years. The relation of the Court with the Supreme Council were unfortunately not happy. It also came into conflict with the Courts administering criminal justice. The famous trial and conviction of Nuncoomar, and the case of the Raja of Casigarh excited much attention. Consequently the Act of 1781, (21 Goe 111 c 70) was passed to set limits to the Jurisdiction of the Supreme Court. The Supreme Court was abolished in 1860-62,

3 At Patna, at Dacca, at Murshidabad and one in the vicinity of Calcutta these courts were abolished in 1803.

4 The court at first consisted of the Governor-General and members of the Supreme Council. In 1801 it was made to consist of 8 judges and in 1811 it was made to consist of a chief judge and as many puisne judges as the Governor General in Council may appoint (Reg. XII 1811 s. 2). In 1797 by Reg. XVI provision was made for the conduct of appeals from the Sudder Diwani to the King

According to the firman of 1765, the Nizamut or administration of criminal justice was left under the supervision and control of the Nawab. The Muhammadan Courts were retained and "The Muhammadan law was in force throughout the country."¹ The old officers were still retained. The Nawab himself tried all capital cases. The faujdar and Nawab's deputies tried all cases of quarrels and frays etc. The Muhtasib as usual tried all cases of drunkenness and selling liquors. The Kutwal was still the prefect of the Police.

In A. D. 1772 Warren Hastings completely transformed the machinery for the administration of criminal justice. The office of Nawab Diwan was abolished, the work was taken up by the British Agency. A new court of criminal Judicature called the Faujdary Adawlut was established in each district for the trial of "murder, robbery and theft, and all other felonies, forgery, perjury, and all sorts of frauds and misdemeanours, assaults, frays, quarrels, adultery, and every other breach of the peace or violent invasion of property".² In these criminal courts the Kazi or Mufti with the assistance of two Maulvies sat to hold trials? The English Collectors of Revenue were however directed to superintend the proceedings of these courts. These Faujdary Adawluts were under the control of the Sudder Nizamut Adawlat established at Murshidabad. This supreme court was presided by Darugha as the chief officer, who was appointed by the Nazim. The Chief Kazi, Kazi-ul-Kuzat and the Chief Mufti and three Maulvis sat to assist the Darugha in discharging his duties. The duty of the court was "to revise all the proceedings of the Faujdary adawluts and in capital cases, by signifying their approbation and disapprobation thereof, with their reasons at large, to prepare the sentence for warrant of the Nazim".² This court, shortly after its inauguration, was removed to Calcutta, but in A. D. 1775 it was removed back to Murshidabad where it discharged its duties under the control of

¹ H. Cowell Courts and Legislative authorities p. 27.

² Plan Rule VII, W.H. Morley, An Analytical Digest p. XXXV.

the Nizam for fifteen years.¹ The Muhammadan law as modified by various regulations was administered in the courts. In 1790 by Lord Cornwallis' regulations the powers of the Nazim were transferred to the Governor-General in Council and the entire system of the administration of criminal justice was remodelled.

At Calcutta the Nizamut Adawlut consisted of the Governor-General and members of the Supreme Council assisted by the Kazi-ul-kuzat and two muftis.² This court was the court of Criminal Appeal and also a Board of Police. Four courts of circuit consisting of two judges assisted by Kazis and Muftis as assessors³ were also established, and in capital cases they were to report their decisions for the confirmation of the Nizamut Adawlut at Calcutta. The Judicial Regulation XXVI of 1790 S. 33 provided that in trials for murder the doctrine of Abu Yusuf and Muhammad requiring the evidence of criminal intention was to be applied in giving Fatawa of the Law officers. By Jud. Reg. XXVI the relations of a murdered person were debarred from pardoning the offender. In 1791 the Judges of the courts of circuit wherever they dissented from the Fatawa of the law officers were required to refer the case to the Nizamut Adawlut.

By Jud. Reg. XXXIII 1791 S. 3 imprisonment and hard labour was substituted for mutilation, and the Nizamut Adawlut was required to pass the sentence of death instead of granting "Diyat" to the heir. By Reg. II 1801 S. 10 the constitution of the Nizamut Adawlut was altered, instead of the Governor-General and council the court consisted of three judges⁴ assisted by the Chief Kazi of Bengal, Bihar, Orissa and Benares⁵ and two Muftis.

1 Warren Hastings presided in the Chief Criminal Court at Calcutta for about eleven months. At Mursidabad the Nizamut Adawlut was under the supervision of Muhammad Riza Khan.

2 Jud. Reg. XXVI 1790 Preamble.

3 W. H. Morley Analytical Digest Vol. 1 p. XLIII.

4 Reg XII 1811 S. 2 increased the number of Judges as in the Sudder Diwani Adawlut.

5 Reg. IX of 1793 sec. 67 Reg. XXXIX of 1793 and Reg. XLIX of 1795 extended the Kazis jurisdiction to Benares but Reg. VIII of 1809 provided for the abolition of the office of

In 1829 the courts of circuit were abolished and commissioners of circuit were appointed with the same powers as judges of circuit. Gradually the practice grew up of appointing "District and Sessions Judges."

A High Court was established at Calcutta by the charters in 1862-1865. The High Court took up the administration of Justice of the Civil and Criminal Law. The court of the Sudder Nizamut (Faujdary Adawlut) was abolished.

In 1802 the Madras Government founded a system for the administration of Justice, there were the Native Madras. Commissioners, and the zillah courts and the Provincial Courts (four in number) were to hear appeals from the zillah courts. The plan for the administration of criminal justice was the same as in Bengal. The Faujdary Adawlut was the chief criminal court. It consisted of the Governor and members of the council. "All these criminal courts administered the Muhammadan Law as modified by the Regulations."¹

Thus the Muhammadan Criminal Law was administered in the Madras Presidency and the usual fatawas were given in each case, however Act I of 1840 dispensed altogether with the Fatawa, but it still retained the principles of the Muhammadan Law. The Madras High Court was established by the charters in 1862-1865. The High Court exercises both civil and criminal jurisdiction.

In Western India predecessors of the English were the Marathas, consequently, there was no trace of the Bombay. Muhammadan Law either Civil or Criminal in that province. In 1797 the Bombay Government was authorised to constitute courts of civil and criminal Judicature on the system introduced by Lord Cornwallis, in Bengal. The Muhammadan Criminal Law did not generally prevail. The Hindus were tried by the Hindu Criminal Law, the Parsis and Christians by the English Law.² Thus in the development of the judicial system in the Bombay Presidency the Muhammadan Law was of no

¹ W. H. Morley's Analytical Digest Vol. 1 p. LXIV.

² Reg. V 1799 S. 86 and Reg. III 1800 s. 86.

importance. The Bombay High Court was established by charters in 1862-65. The Bombay High Court exercises both civil and criminal Jurisdiction.

In Benares a Court of Justice was established in 1781 and similar courts were established at Jaunpur, Mirzapur and Ghazipur in 1788. These court administered the Muhammadan Law.¹ By Reg. VI of 1831 a Sudder Diwani Adawlut was established in the North-Western Provinces on the same system as was prevalent in Bengal. In 1866 the High Court was established at Allahabad, it exercises both civil and criminal jurisdiction.

The Punjab was the first to be conquered by the Muslims and the Muslim law was administered there till the rise of the Sikh power. In A. D. 1849 the Punjab became a British Province. The Governor-General instead of introducing the Bengal system of the administration of justice gave a general instruction to uphold native institutions practices so far as they are consistent with the distribution of justice to all classes.

We have surveyed briefly the civil and criminal administration of Justice by the East India Company. We have seen that in the civil courts and especially in the criminal courts the Muhammadan law was being administered and the Muhammadan officers of justice were retained. In Warren Hastings' plan for the establishment of judicial system it was distinctly provided that the "Maulavis" were to attend the courts and expound the Muhammadan law.

The following procedure is suggested from the letter of the Committee of Circuit to the Council at Fort William, dated Cassimbazar, August 15, 1772 :—²

"The Cazee is assisted by the Muftee and Mohtassib in this court. After hearing the parties and evidences, the Muftee writes the Fettwa or the law applicable to the case in question, and the Cazee pronounces judgment accordingly. If either the Cazee or

¹ Archibold W. A. J. Indian Constitutional History, p. 140.

Archibold W. A. J. Indian Constitutional History, page 51.

Mohtassib disapprove of the Fettwa, the case is referred to the Nazim, who summons the Ijlass or General Assembly, consisting of the Cazee Mufti, Mohtassib, the Darogas of the Adawlut, the Maulavis and all learned in the law, to meet and decide upon it. Their decision is final."

In the Civil matters the Muhammadan Law was easily superseded, but it continued for a long time to be administered in the criminal courts. However it was not the pure Muhammadan Law.¹ It was being modified by various regulations, and the Muhammadan tribunals administered the Muslim law subject to the supervision of an English authority. Morley² suggests that the Government assumed itself to possess an inherent right to alter the provision of the Muhammadan Law, and this appears to have been tacitly upheld by the Parliament (13th Geo. III C. 63 S. 7). The President and Council frequently interposed and altered the Law. Nevertheless the Government was extremely reluctant to interfere with the application of Muhammadan Criminal law. The following letter addressed by the Collector of Islamabad to the Officer Commanding, the Company's troops at Chittagong, strikingly illustrates this view :—³

"Sir,

"Agreeable to a *derkaste* (application) delivered to me by Muhammad Sumee, Darogah of the Nizamat Adawlut, I have to request you will grant him a party sufficiently strong to assist him in carrying into execution the Fetwahs of the Nazim upon Mahomed Shuffee, Mahommed Rustam, Ameer Mahommed and Loodie Dacoits, who are to suffer impalement and I beg leave to acquaint you that for the sake of example the Darogah proposes to have the sentences executed in four different divisions of the province, *vis.* at the Funny, Soorporah, Muriascrai and Jugecollah.

I am, Sir,

Your most obedient humble servant,

John Buller.

Islamabad, the 12th October, 1781.

1 The regulation of 1772, section 72 "in all suits regarding inheritance succession, marriage and caste and other religious or institutions or usages the laws of the Koran with respect to Muhammadans.....shall invariably be adhered to"

2 W. H. Morley. "An Analytical Digest", p. CLXXVI.

3 R. Wilson Anglo-Muhammadan Law, c. 80.

Here is a letter from Warren Hastings¹ :—

“The officers of the Nizamat have again declared the propriety of the sentence, and that is strictly conformable to the Muhammadan Law. As the natives are not to be tried according to our notions of justice, but by the law of the country, *excepting in very extraordinary cases where it has been usual for Government to interpose*, I must request that you will permit the officers appointed for the purpose to carry the enclosed warrant into immediate execution.

I am, Sir,

Your most obedient humble servant,
Warren Hastings.”

In 1790 the abolition of the office of Nawab Nazim weakened the position of the Muhammadan tribunals, but the criminal courts were directed to administer the Muhammadan Law, and in cases of murder the sentence was to be according to the opinions of Imam Abu Yusuf and Imam Muhammad.² The same was the direction to the criminal courts established in 1793.³

The administration of justice of the Muslim Law was further weakened by the abolition of the office of Kazi in 1809 from the Nizamat Adawlut,⁴ and in 1832 it was enacted in Bengal that all persons, who were not Muhammadans, might claim to be exempted from the trial under the Muhammadan criminal law for offences cognizable under the general regulations.⁵

The Act XI of 1864 abolished the offices of Muhammadan Law officers, the Kazi-ul-kuzat and of subordinate Kazis, ⁶

¹ Roland Wilson Digest of Anglo-Muhammadan Law, page 30. The italics is in Hastings' own hand-writing.

² Beng. Reg. XXVI 1700, Ss. 32, 33.

³ Beng. Reg IX 1793, Ss. 47, 50, 74, 75.

⁴ Reg. VIII of 1809.

⁵ Beng. Reg VI 1832, S. 5.

⁶ “An Act to repeal the laws relating to the offices of Hindoo and Muhammadan Law officers and to the offices of Cazi-ul-cozaat and of Kazi, and to abolish the former officers (Repealed by Act VIII of

however in 1880 the Kazis' Act XII¹ was passed which gave power to the Local Government to appoint Kazis in any local area after consulting the principal Muhammadan resident of such local area. These Kazis possess no judicial or administrative powers, the only function which they now usually perform is to help in the celebration of marriage, and even here their presence is not essential. The Regulations were thus the instruments which gradually abolished the Muhammadan Law. The change was very gradual, it was hardly perceptible by the people.

Immediately after the Proclamation of the Queen, in 1858 the Civil Procedure Code,² the Penal Code³ and the Criminal Procedure Code, all of which have been in preparation for a long time were enacted. These three Codes were passed respectively in 1859, 1860, and 1861, and in 1861 the Indian High Courts⁴ Act 24 and 25 Vic. C. 104 authorised the Queen to establish the High Courts in Calcutta, Madras and Bombay. The Allahabad High Court was established in 1866. The result of passing these measures was to establish in India a uniform Law and a uniform system of Civil and Criminal Courts. The Indian Penal Code completely superseded the Muhammadan Criminal Law.

Sir Roland Wilson says : " The system was gradually anglicised by successive Regulations, the Muhammadan element did not entirely disappear till 1862, when the Penal Code and the first Code of Criminal Procedure came into force, nor as regards rules of evidence till the passing of the Indian Evidence Act in 1872."⁵

1 Act XII of 1880, Section 4.

"Nothing herein contained and no appointment made hereunder shall be deemed—

(a) To confer any judicial or administrative powers or any Kazi or Naib Kazi appointed hereunder; or

(b) To render the presence of a Kazi or Naib Kazi necessary at the celebration of any marriage or the performance of any rite or ceremony; or

(c) To prevent any person discharging any of the functions of a Kazi.

2 At present we have the Civil Procedure Code Act V of 1908.

3 The Indian Penal Act XLV of 1860 and the Criminal Procedure Code Act V of 1898, as amended by the Acts of 1923.

4 The High Courts Act 1911, 1 and 2 Geo. V. C. 18.

5 Anglo-Muhammedan Law, p. 80.

The following few cases will illustrate the administration of Justice of Muslim Criminal law by the Courts of the East India Company :—¹

Administering Poisonous or deleterious Drugs

Administering a deleterious drugs (dhatura), to the effects of which the death of the deceased is to be attributed, not coming within the five fold definition of culpable homicide under the Muhammadan Law, the prisoner was declared liable to discretionary punishment by Akubat and imprisoned for life, Government v. Mt. Sookhoo, 29th July 1800, I.N.A. Rep. 216 Harington and Fombelle.

The Fatwa declared that the act of giving poison with a murderous intent to one persons, by means of which poison a third person is unintentionally killed, is not by Muhammadan Law, punishable with death. But the Nizamat Adawlut may inflict capital punishment under the provision of Cl. 1 Sec 10 of Reg. VIII of 1803.....Sentence, death. Government V Mt. Indeea, 20th Dec. 1813. 1 N.A. Rep. 287—Fombelle and Rees.

Affray

"The Muhammadan Law makes a distinction between him who is proved to have struck the deceased in an affray, and those present aiding the abetting. The Nizamut Adawlut considered all present equally culpable, and sentenced them accordingly to imprisonment for five years."

Mt. Soondree v. Bojoo Gaynee and others, 30th April, 1814, I.N.A. Rep 299—Colebrook and Fombelle."

Burglary

"If a thief breaks through the wall of a house and entering therein take the property of another, and deliver it to an accomplice standing at the entrance of the breach, the specific penalty of Hadd prescribed by the Muhammadan Law for larceny without violence (Sarakah-i-Sogra) is not incurred by either of the parties. Sentence twenty-five korahs and imprisonment in banishment for fourteen years Poorun v. Munghraw and another, 6th February, 1813, 1 N.A. Rep. 255—Fombelle and Rees."

Compulsion, Homicide by

"The prisoner having killed the deceased by order of his master, and under fear of immediate death in case of refusal, the Fatwas declared that he was not liable to Kisas and should be released. The court accordingly directed his immediate release, Boodhun v. Ratra, 30th Jan., 1806, I.N.A. Rep. 101—Harington and Fombelle."

¹ W.H. Morley, Analytical Digest, p. 115.

False Personation

"False personation for one's own advantage is an offence under the Muhammadan Law.....the punishment is at the discretion of the Hakim....."
Government v. Aluk Shah, 13th June, 1889, 5 I.N.A. Rep. 122—Bradden and Tucker."

Murder

"A boy aged fourteen years was convicted of the murder of a boy of eleven years of age for his ornaments. The Fatwa declared Kisas barred as the prisoner and not attained the age of puberty and that he was liable to discretionary punishment by Tazir. Sentence, imprisonment in transportation for life. Poorun v. Budlooah, 11th June, 1810, I.N.A. Rep. 213—Stuart."

"A woman and her son, a boy aged nine years were convicted by the Fatwa, the former of the murder of a child for its ornaments, and the latter of aiding in the same. The mother was sentenced to death, and the son, in consideration of his extreme youth, was discharged without punishment, under the discretion left by the Fatwa" Laljee v. Mt. Soobhanee and another, 21st July, 1807, I.N.A. Rep. 152—H. Colebrooke and Fombelle."

Public Justice

"The Muhammadan Law admits the right of the ruling power to punish serious offences for the ends of justice though the injured party waive his private claim."
Mt. Sebha v. Moyunoola, 19th September, 1818. I.N.A. Rep. 367—Harington and Fendall."

Trove

"Under the Muhammadan Law a Multakit, or finder, failing to make public advertisement of Luktah or trove property, subjects himself to discretionary punishment, Chundoo v. Sheikh Roopun and others, 15th May, 1815, I.N.A. Rep. 808—Fombelle and Ker."

§ 2. The Courts in British India

The Constitution of the Indian High Courts is contained in Part IX of the Government of India Act 1919 (9 and 10 Geo., 5 Ch. 101) the letters patent of each High Court define its jurisdiction and may be amended from time to time by His Majesty by further letters patent. At the present time the following High Courts and Chief Courts are functioning in India. There is a right of appeal in civil cases under certain contingencies

to His Majesty's Privy Council *vide* sections 109-110 of the Civil Procedure Code Act V of 1908.

- (1) The High Court of Judicature Calcutta.
- (2) The High Court of Judicature Bombay.
- (3) The High Court of Judicature Madras.
- (4) The High Court of Judicature Allahabad.
- (5) The High Court of Judicature Patna.
- (6) The High Court of Judicature Lahore.
- (7) The High Court of Judicature Rangoon.
- (8) The Chief Court of Oudh Lucknow.
- (9) The Court of the Judicial Commissioner Sindh.
- (10) The Court of the Judicial Commissioner Nagpore.

The following are the subordinate Civil Courts,—¹

1. The Court of the District Judge.
2. The Court of the Additional Judge.
3. The Court of the Subordinate Judge.
4. The Court of the Munsif.

For purposes of the Muslim Law of marriage, dower, divorce inheritance, will, gifts and pre-emption suits will be instituted in the Court of first instance which may be the Court of Munsif or that of the Subordinate judge, it would depend upon the valuation of the suit. The cases concerning *waqfs* are instituted in the Court of the District Judge. There is a right of first appeal or second appeal to the High Court as provided by the Civil Procedure Code.³

¹ And (5) The Small Cause Courts.

² The High Courts and Chief Courts have both civil and criminal jurisdictions the following are the criminal courts.

- (1) Courts of Session.
- (2) Presidency Magistrates.
- (3) Magistrates of the first class.
- (4) Magistrates of the second class
- (5) Magistrates of the third class.

³ *Vide* Sections 96—109.

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Abbreviations

- Agra**—Agra High Court Reports.
All—Indian Law Reports, Allahabad series.
A. I. R.—All India Reporter.
A. L. J. R.—Allahabad Law Journal Reports
A. W. N.—Allahabad Weekly Notes.
Bom.—Indian Law Reports Bombay Series.
B. L. R.—Bengal Law Reports.
B. H. C.
 or —Bengal High Court Reports.
B. H. C. R.
C. L. R.—Calcutta Law Reports
C. W. N.—Calcutta Weekly Notes.
I. C.—Indian Cases.
In. A.—Indian Appeals
I. S. A.—Indian Succession Act.
Lah.—Indian Law Reports, Lahore Series
Luck.—Indian Law Reports Lucknow Series
Moo. I. A.—Moore's Indian Appeals
N. W. P.—North Western Provinces High Court Reports
O. C.—Oudh Cases Report
Pat. L. J.—Patna Law Journal
Perry. O. C.—Perry's Oriental Cases
P. R.—The Punjab Records
Rang.—Indian Law Reports, Rangoon Series
Reg—Regulations.
S. I. A.—Sudder Dewanny Adawlat
W. R.—Weekly Reporter.
F. B.—Full Bench.
P. C.—Privy Council.

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Juristic Works on the Muslim Law and Jurisprudence

by

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